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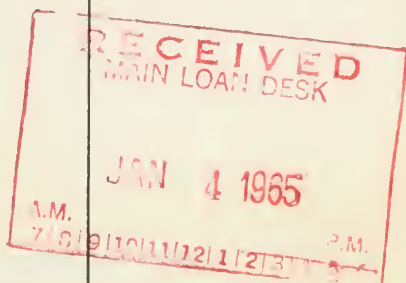
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THE LAW OF THE EMPLOYMENT OF LABOR



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THE LAW
OF THE
EMPLOYMENT OF LABOR

BY
LINDLEY D. CLARK, LL.M.

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PREFACE

THIS volume is an attempt to cover the field of law as it affects the employment of labor in the United States. It is at once evident that the method cannot be exhaustive, since single departments of the subject have properly formed the theme of a number of treatises, in some instances massive; while under the head of legislation, the compilation of the labor laws of the states and the United States, issued from time to time by the United States Bureau of Labor, has grown to be a volume of inconvenient bulk. It has been thought possible, however, to discuss and illustrate by the citation of an adequate number of representative cases and statutes the principles of the common law in their most important phases, as well as the nature and trend of legislation, in so far as these are applicable to workmen and their employers in their relations as such, in a single volume of convenient size. No detailed account of the items of legislation could be presented in a work of this character, since they are shifting so rapidly that a volume could hardly be put through the press before it needed revision. A summary and general view of such laws and of their legal construction and effect will answer the purpose of the student of the question of the legal control of the subjects under consideration, while sufficient references are furnished to enable the pursuit of the subject in further detail if desired. An effort has been made to present with practical completeness the legal principles involved in protective and regulative legislation of this class, in so far as they have been made the subject of judicial determination by the

higher courts, so that, while the volume is intended primarily to interest the student of the conditions of labor, it is believed that its value as a legal handbook is limited chiefly by its brevity, and that it will nevertheless be found worthy of consideration in such an aspect.

A recognized pressing need of the social organization is the securing of safe and wholesome conditions of work and an adjustment of the relations of employer and employed in the light of their mutual and reciprocal rights and interests, so that there shall be neither undue advantages nor undue burdens on either side. It is not many years since such legal provision as existed was embodied solely in the common law, that body of customs and adjudications that had come to have the sanction of the courts of England and America to such an extent that it became a clog to any progressive adjustment of law to changing economic conditions. Clearly a policy shaped in the days of the hand loom and forge and transportation by horse power could poorly provide for the needs of industry to-day. The common law reduced to a codified form is printed as an appendix to this volume, and sufficient evidence of its inadequacy is afforded if this code is compared with the scores of statutes compiled in the fifteen-hundred-page volume of labor laws, forming the Twenty-second Annual Report of the United States Commissioner of Labor, presenting the enactments of the legislatures of the various states in their attempt to prescribe the respective rights and duties and to safeguard the physical and economic interests of the parties to the labor contract. There is a feeling, only too well founded, that, despite legislation, the dead hand of outgrown doctrines of the common law restrains the courts in their construction of statutes; but that there is encouraging advance in this respect cannot be gainsaid.

The unusual activity at this time of a number of states and

of various organizations in attempting to solve the problem of a better distribution of the burdens of industrial accidents affords a clear indication that the present doctrine of employers' liability will not much longer maintain the position of controlling importance which it now occupies. That the fundamental assumptions of this doctrine have been long since outgrown in the destruction of actual personal contact between employer and workman and the growth of the great industries of transportation, manufacturing, and mining, in which the mutual responsibility of fellow-workmen becomes impossible, is a conclusion that cannot be disputed. The widespread study of the principles of compensation by federal and state commissions and otherwise, and the enactment of compensation laws by the federal Congress and by several state legislatures are doubtless but the forerunners of great and desirable changes in the attitude of the law-making bodies and the courts in respect of this subject.

To what extent the collective bargaining of the labor union is to affect the contract of employment is another unsettled question. As in the above mentioned matter, it is a question of absolute individualism giving way to collectivism, or at least a modified individualism, as a result of far-reaching changes in the industrial organization, for which the workingman is not primarily responsible. It is not too much to say that epoch-making decisions affecting labor organizations are being made and to be expected shortly. The law on this subject is in an unsettled condition, and will doubtless remain so for a long time to come. The diversity of interests of the employing and employed classes, as they are now conceived, and as they have always been regarded so far as history gives account of the employment of labor, does not permit an anticipation of an early or easy settlement of the questions involved between these two elements of the

producing and distributing forces of society. It seems hardly more than commonplace to say that the more rapidly the reciprocal rights of combined and delegated representation of the two parties are recognized, the more rapidly the existing problems will find their solution.

LINDLEY D. CLARK.

WASHINGTON, 1911.

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LAW OF THE EMPLOYMENT OF LABOR

CHAPTER I

THE CONTRACT OF EMPLOYMENT

SECTION 1. *The Basis of the Relation of Employer and Employee.* — In order that the status of employer and employee may come into existence there must be a contract or agreement between the employer or his representative and the person entering upon service or his representative. Such a contract may be informal to the extent of being only inferable from the conduct of the parties,¹ or it may be carefully drawn in writing, signed, and witnessed. Contracts which cannot be completed within one year, to be enforceable, must be in writing, being within the statute of frauds.² In case of an implied contract, sufficient facts must be shown to support it,³ since a mere volunteer can neither collect wages nor hold the person served liable for injuries.⁴ No practicable form of contract, however elaborate, could be presumed to embody all the conditions and consequences that result from the consent of the parties, the one to

¹ *Nimmo v. Walker*, 14 La. Ann. 581.

² *Jones v. Hay*, 52 Barb. 501 (N.Y.); *Hasselman Printing Co. v. Fry*, 9 Ind. App. 393, 35 N.E. 1045.

³ *Hart v. Hess*, 41 Mo. 441; *Goddard v. Foster*, 17 Wall. 123 (U.S.); *Robinson v. Cushman*, 2 Den. 141 (N.Y.).

⁴ *Roberts v. Swift*, 1 Yeates 209 (Pa.); *Jones v. Jincey*, 9 Grat. 708 (Va.); *Bartholomew v. Jackson*, 20 Johns. 28 (N.Y.); *Langan v. Tyler*, 114 Fed. 716 (C.C.A.).

render service, and the other to receive it and to pay compensation therefor. In other words, there is formed a status of the two parties, determined by long usage, the rulings of the courts in unnumbered cases, and many statutory enactments, the details of which are to be known only by a consideration of the whole law relating to employment, and which no contract attempts to express.

There is not in the United States, nor has there ever been since the establishment of the Government, any difference between contracts of hiring and other contracts, so far as the generally controlling principles of law are concerned. Competent parties (*i.e.*, of legal capacity), mutual agreement, and lawful and sufficient consideration, are the essentials here as elsewhere. The same limitations, neither more nor less, as to immoral acts or those otherwise contravening public policy affect the contract of employment as they do other contracts. But the agreement having been reached, the law intervenes to secure to both parties certain rights and defenses that have been conceived, through a long series of adjudications and legislation, to best conserve the interests of the immediate parties to the contract, and, in what may fairly be said to be an increasing degree, the interests also of that great third party, the general public.

SECTION 2. *Conditions of the Contract.* — Among the conditions imposed by law, but not at all appearing in any customarily used contract, are the requirement that the employee shall be engaged only in lawful pursuits,¹ that he shall be treated with reasonable regard to health and comfort,² that he shall not be

¹ Warner v. Smith, 8 Conn. 14; Com. v. St. Germans, 1 Browne 241 (Pa.).

² Gillis v. Space, 63 Barb. 177 (N.Y.); Luske v. Hotchkiss, 37 Conn. 219.

exposed to other risks than those reasonably incident to his employment,¹ and that the conditions surrounding employment shall not be corrupting or immoral.² On the other hand, an employee is supposed to be competent,³ to obey reasonable instructions and commands,⁴ to use ordinary care in the performance of his work,⁵ and to have due regard for his master's interests.⁶

Rules of the employer or customs of the trade, not in terms forming a part of the contract of employment, must be shown to have been known to both parties at the time the contract was entered into if they are to be incorporated therein as a matter of defense in an action at law.⁷ And a mere continuance in service after becoming aware of regulations not known at the time the contract was made is only evidence tending to show assent, and is not conclusive.⁸

Where the rate of wages is not definitely fixed, custom may be referred to, and the court will undertake to find out what the services were reasonably worth and award a quantum meruit,⁹ due regard being had for special skill or professional ability;¹⁰ and so of the other factors that enter into a contract of employment, though the rules of common law, the effect of custom, and even the terms of the contract itself are becoming more and

¹ See Chapter VI.

² *Warner v. Smith*, *supra*; *Berry v. Wallace*, Wright 657 (Ohio).

³ *Waugli v. Shunk*, 20 Pa. St. 130; *Parker v. Platt*, 74 Ill. 430.

⁴ *Lawrence v. Gullifer*, 38 Me. 532.

⁵ *McCracken v. Hair*, 2 Speers 256 (S.C.).

⁶ *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242.

⁷ *Dodge v. Favor*, 15 Gray 82 (Mass.); *Harmon v. Salmon Falls Mfg. Co.*, 35 Me. 447.

⁸ *Collins v. Iron Co.*, 115 Mass. 23.

⁹ *Bagley v. Bates*, Wright 705 (Ohio); *Miller v. Cuddy*, 43 Mich. 273, 38 Am. Rep. 181.

¹⁰ *Stockbridge v. Crooker*, 34 Me. 349.

more affected by statutory enactments and the construction put upon them by the courts of the various states.

The general rule applicable to the formation of contracts that there must be a meeting of the minds of the parties thereto, is in force in labor contracts to prevent fraud and misrepresentation as to the conditions in existence in the employer's works or business; but a few states have enactments looking to the more specific prohibition of deception, and particularly in the matter of the existence or non-existence of strikes.¹ The nature of the employment and the prevalent sanitary conditions must not be misrepresented, under like penalty, though with reference to strikes, it is in most cases made unlawful to fail to give notice where they are in existence, while only actual false statement with reference to other conditions is condemned.

SECTION 3. *Freedom to Contract.* — Whether the right of contract is inherent in free manhood, as has been concluded from the guarantee of Magna Charta that "No freeborn man shall be disseized of his free tenement or liberties or his free customs," taking "customs" to include freedom of trade; or whether it depends on such guarantees as are found in our national and state constitutions, is a question of historical interest, but not of controlling importance. There is frequent reference to the fourteenth amendment to the Constitution of the United States in cases in which the freedom of contract is discussed,² as well as to the similar provisions of the state constitutions relative to the protection of liberty and property. While these seem practically to embody the doctrine of the clause of

¹ Cal., Sim's Penal Code, p. 635; Ill., R.S., ch. 48, sec. 49; Mont., Acts 1903, ch. 80; Oreg., Acts 1903, p. 193; Tenn., Acts 1901, ch. 104.

² *Allgeyer v. Louisiana*, 165 U.S. 578, 17 Sup. Ct. 427; *Lochner v. New York*, 198 U.S. 45, 25 Sup. Ct. 539.

Magna Charta quoted above, it is sufficient for our present purpose that these guarantees exist, and that, with the common acceptance of the view that the protection of property involves the protection of the right to make reasonable contracts with reference to its acquisition and use, they are understood to guarantee the freedom of the contract of employment.¹

Labor is the workingman's capital, and it is his right to employ it or dispose of it as may appear to his judgment best in the conditions in which he finds himself, subject only to the rules of law that forbid contracts which are against public policy.² Every man has the right to earn his living, or to pursue his trade or business, without undue interference, a right of absolute freedom to employ or to be employed,³ to make contracts with reference to service, whether as employer or employee, or to refrain from making them, for any reason or no reason,⁴ and such a right is both a liberty and property right, within the guarantees of the federal Constitution.⁵ Such a statute as that of Indiana, therefore, which prohibits employers from discriminating against persons or classes of persons seeking employment, by posting notices or otherwise,⁶ is obviously of no value, since the employer is as free to reject as the employee is to refuse any proposition for employment, no matter by whom made, or for what reason held undesirable.

¹ *Lochner v. New York*, *supra*; *Muller v. Oregon*, 208 U.S. 412, 28 Sup. Ct. 324; *Atkins v. Fletcher Co.*, 65 N.J. Eq. 658, 55 Atl. 1074.

² *People v. Marx*, 99 N.Y. 377, 2 N.E. 29; *In re Jacobs*, 98 N.Y. 98; *Frorer v. People*, 141 Ill. 171, 31 N.E. 395.

³ *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

⁴ *Adair v. United States*, 208 U.S. 161, 28 Sup. Ct. 277; *New York, C. & St. L. R. Co. v. Schaffer*, 65 Ohio St. 414, 62 N.E. 1036.

⁵ *State v. Missouri Tie & Timber Co.*, 181 Mo. 536, 80 S.W. 933; *Jones v. Leslie*, (Wash.) 112 Pac. 81.

⁶ A.S., sec. 7087p.

SECTION 4. *Limitations on Freedom of Contract.* — This freedom is legal rather than economic and practical, and has been called a legal fiction, a designation which appears just in view of the widespread manifestation of a purpose to interfere with and restrict it by legislative action. The man without invested capital requires the constant return from his labor in order that his own needs and those of his dependents may be met; while the employer, who may as imperatively require labor for the conduct of his business, still has between him and immediate want a reserve fund which makes him the economic superior of the average man seeking employment. To lessen this inequality, organized labor provides "out-of-work" and "strike" funds, to tide the membership over the period of unemployment. The rules of labor organizations also restrict the free action of their members, while society at large proceeds by way of legislation, seeking to fix the conditions of employment, either generally, or for specific industries or groups of industries. There is now a very considerable body of such legislation relating to the modes and times of paying wages, and, on public works, the rate of wages; to the hours of labor, the condition of working places, the guarding of machinery, the employment of women and children, and much also that would not come within the scope of statutory regulation were it not for the recognized difference between the average employer and the average employee in freedom to choose or reject the conditions of employment. Of wider general scope, but of less importance as actually affecting the contract of employment, are provisions found in the codes of a few states, taken from the work of a commission appointed by the state of New York in the year 1857, to draft a code for that state. This draft was a codifica-

tion in pretty complete form of the common law, and, though it was rejected by the state for which it was prepared, it was adopted by California, Montana, and the Dakotas.¹ It is, as indicated, nothing more than a restatement of the principles of the common law, so that while it embraces many of the topics to be considered in the present undertaking, its provisions call for no discussion apart from that given the rules laid down by the courts as the common law.

SECTION 5. *Police Power.* — The question naturally arises as to the right or authority of legislatures to intervene in the matter of contracts of employment so as to modify the otherwise prevalent rule of unrestricted freedom; and the answer is that it is only as an exercise of the so-called police powers of the states that such acts can be accepted as valid. What these police powers are is not a matter of accurate definition, inasmuch as they concern the policy of the individual states, which is subject to growth and change with changing industrial and social conditions.² The police power, in its broadest acceptance, means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property, as may be conducive to the public interest.³ It relates to the safety, health, morals, and general welfare of the public. Both property and liberty

¹ See Appendix. This code has been amended in some respects in at least three of the states named, but is reproduced in practically its original form as presenting in brief the principles of the common law governing the contract of employment. It is referred to as the Field Code, from its chief editor.

² *Atkin v. Kansas*, 191 U.S. 207, 24 Sup. Ct. 124; *Holden v. Hardy*, 169 U.S. 366, 18 Sup. Ct. 383.

³ *Am. & Eng. Cyc. of Law*, Vol. 22, p. 916.

are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of this power, and with such conditions the guarantees of freedom of contract in the fourteenth amendment were not designed to interfere.¹ In the case just cited, it was said that this power exists in the sovereignty of each state, but is none the less subject to the inquiry whether any particular exercise of it or enactment under it is fair, reasonable, and appropriate; or whether, on the other hand, it is an unreasonable, unnecessary, and arbitrary interference with the right of individuals to their personal liberty. Not every invasion of the right of liberty or property will be condemned, however,² and it will be left to the legislatures of the states to declare, as the representatives of the people, what restrictions, within the constitutional limitations, will be placed on the freedom of contract; and it is laid down by our highest tribunal that, while it is the duty of the courts to guard the constitutional rights of the citizen against merely arbitrary power, it is equally true, and imperatively demanded, that legislative enactments declaring the policy of the state should be recognized and enforced by the courts unless they are plainly and beyond all question in violation of the fundamental law of the Constitution.³ The fact that principles are at one time accepted as governing under the decisions of the courts construing the common law does not bind them irrevocably upon the state. "While the court, unaided by legislative declaration, and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy,

¹ *Lochner v. New York*, 198 U.S. 45, 25 Sup. Ct. 539.

² *People ex rel. Williams Engineering, etc., Co. v. Metz*, 193 N.Y. 148, 85 N.E. 1070; *Booth v. People*, 186 Ill. 43, 57 N.E. 798.

³ *Atkin v. Kansas*, *supra*; *Holden v. Hardy*, *supra*.

its determination as a rule for future action must yield to the legislative will when expressed in accordance with the organic law. The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state.”¹

SECTION 6. *Term of the Contract.* — Apart from those contracts which by their terms fix the period of their duration stands the body of contracts to hire generally or for an indefinite time, forming the vast majority of labor agreements. In most jurisdictions in this country a contract for an indefinite period is, subject to proof to the contrary, terminable at any time at the option of either party.² An unsupported promise for permanent employment is of this nature;³ but if an employee has secured an option to his contract for permanent employment by waiving a claim for damages,⁴ or by giving up a competing business to engage in the defendant's service,⁵ the contract cannot be set aside merely at the choice of the employer.

According to the English rule,⁶ which is also largely followed in this country, the term of the contract may be inferred from the conditions agreed to as to the times of payment, payments

¹ *Chicago, B. & Q. R.R. v. McGuire*, 219 U.S. 549, 31 Sup. Ct. 259.

² *Lord v. Goldberg*, 81 Cal. 596, 15 Am. St. Rep. 82; *Kansas P. R. Co. v. Roberson*, 3 Colo. 142; *Babcock, etc., Co. v. Moore*, 62 Md. 161; *Hotchkiss v. Godkin*, 63 App. Div. 468, 71 N.Y. Supp. 629.

³ *Lord v. Goldberg, supra*; *Louisville, etc., Co. v. Offutt*, 99 Ky. 427, 36 S.W. 181; *St. Louis, I. M. & S. R. Co. v. Mathews*, 64 Ark. 398, 42 S.W. 902.

⁴ *Smith v. R. Co.*, 60 Minn. 330, 62 N.W. 392; *Pierce v. R. Co.*, 173 U.S. 1, 19 Sup. Ct. 335; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N.E. 802 (contract for “steady and permanent employment” held to be one for life, or so long as the employee should be able, ready, and willing to perform the services assigned by the company); *Stearns v. R. Co.*, 112 Mich. 651, 71 N.W. 148. But see *Texas M. R. Co. v. Morris*, 29 Tex. Civ. App. 491, 69 S.W. 102.

⁵ *Carnig v. Carr*, 167 Mass. 544, 46 N.E. 117, 35 L.R.A. 512, and note.

⁶ *Emmens v. Ederton*, 4 H.L.C. 640; *Buckingham v. Canal Co.*, 56 L.T.R. (N.S.) 885. See *Wood, M. & S.*, 272.

by the day, week, month, or year raising the presumption that these periods indicate the length of time the contract is to run,¹ or rather that they mark the time at which it may be terminated by either party.² Definite provisions of the contract will of course control, but in their absence, language denoting periods of payments or measurements of salary or wages, as weekly or monthly, etc., is of great weight in determining the period of the contract.³ Where the time is not indicated with greater definiteness than is set forth in the simple statement that the hiring is at the rate of a designated sum per annum, the contract has been held to be an indefinite one;⁴ but no good reason appears why, in the absence of other considerations impairing the weight of such evidence, a contract at a yearly rate should be on a different footing from a hiring by the week or month, and there is abundant authority for holding that a hiring for a year is meant when it is at a yearly rate.⁵ Especially is this the case where the word "salary" is used.⁶ When one continues in service after the expiration of an agreed or implied term of contract, the law

¹ *Moss v. Decatur Land, etc., Co.*, 93 Ala. 269, 9 So. 188; *Tenn. Coal, etc., Co. v. Pierce*, 81 Fed. 814 (C.C.A.); *Cronemillar v. Milling Co.*, 134 Wis. 248, 114 N.W. 432; *Beach v. Mullin*, 34 N.J.L. 343; *Horn v. Association*, 22 Minn. 233; *Kelly v. Wheel Co.*, 62 Ohio St. 598, 57 N.E. 984.

² *Whitmore v. Werner*, 88 N.Y. Supp. 373; *Capron v. Strout*, 11 Nev. 304; *Norton v. Cowell*, 65 Md. 359, 4 Atl. 408.

³ *Tubbs v. Cummings Co.*, 200 Mass. 555, 86 N.E. 921.

⁴ *Haney v. Caldwell*, 35 Ark. 156; *Tucker v. Coal, etc., Co.*, 53 Hun 139 (N.Y.); *Martin v. Ins. Co.*, 148 N.Y. 117, 42 N.E. 416; *Brookfield v. Drury College*, 139 Mo. App. 339, 123 S.W. 86.

⁵ *Maynard v. Corset Co.*, 200 Mass. 1, 85 N.E. 877; *Chamberlain v. Stove Works*, 103 Mich. 124, 61 N.W. 532; *Moss v. Decatur Land Co.*, 93 Ala. 269, 9 So. 188; *Kirk v. Hartman*, 63 Pa. 97; *Kellogg v. Ins. Co.*, 94 Wis. 554, 69 N.W. 362; *Magarahan v. Wright*, 83 Ga. 773, 10 S.E. 584.

⁶ *Maynard v. Corset Co.*, *supra*; *People v. Meyers*, 11 N.Y. Supp. 217; *Henderson v. Koenig*, 168 Mo. 356, 68 S.W. 72.

presumes that the original contract is renewed as to both period and rate of payment.¹ The Field Code contains the above provisions as to implied term and renewal in statutory form.²

Opposed to the doctrine of implied term set forth above is one that no inference whatever is to be drawn from the use of the words "week," "month," or "year" in fixing the rate of wages.³ One writer goes so far as to say that the rule is inflexible that a hiring at so much a day, week, or year raises no presumption as to the length of time the service is to continue, and that the employee is charged with the burden of proving that any other than an indefinite hiring is meant, terminable at the will of either party.⁴ In this view, a hiring by the month can be terminated at any time, either during the month or at its end, without notice;⁵ and the word "salary" imports nothing as to term, even when stated as a yearly salary.⁶ This statement is obviously too sweeping, and contrary cases are to be found in some of the jurisdictions from which citations come in support of it;⁷ and the better reason clearly favors the attaching of some measure of significance to the designations of periods of time, even though the principal idea is that of rate of payment and not of term of employment.

¹ *Chemical Works v. Pender*, 74 Md. 15, 21 Atl. 686; *Tatterson v. Mfg. Co.*, 106 Mass. 56; *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143.

² See Appendix.

³ *Weidman v. United Cigar Stores Co.*, 223 Pa. St. 160, 72 Atl. 377.

⁴ *Wood, M. & S.*, 2d ed., sec. 136.

⁵ *The Rescue*, 116 Fed. 380; *The Pokanoket*, 156 Fed. 241 (C.C.A.); *Evans v. R. Co.*, 24 Mo. App. 114; *Haney v. Caldwell*, 35 Ark. 156; *Frank v. Maternity, etc., Co.*, 107 N.Y. Supp. 404.

⁶ *Edwards v. Seaboard & R. R. Co.*, 121 N.C. 490, 28 S.E. 137; *Martin v. Ins. Co.*, 148 N.Y. 117, 42 N.E. 416.

⁷ *The Hudson*, *Olcott* 396, Fed. Cas. No. 6831; *Zender v. Seliger-Toothil Co.*, 39 N. Y. Supp. 346; *Jones v. Trinity Parish Vestry*, 19 Fed. 59.

Entire contracts, or those which require complete performance before any part can be considered as performed, allow no proportionate recovery for part performance,¹ — a rule which may well be held to apply to a sailor shipping for a voyage or a tenant engaging to make a crop. The implication of terms, as from a hiring by the month or year, has been held to carry with it the conclusion that such a contract was entire, *i.e.*, for full periods of months or years, and the obvious hardship of such a rule and the failure of the reason therefor in many cases where it is clearly practicable to consider contracts as severable have led to the rejection by some courts of such a rule,² which rejection may in turn have had something to do with the modification of the rule as to implied terms; since it is obvious that if the employee claims the right to hold his employer to payment for entire units of time of employment, he is equitably obligated to render entire units of service or waive claims for fractional parts of the unit of time during which he may have worked, be it week, month, or year.³

SECTION 7. *Enforcement of the Labor Contract.* — A prime consideration in connection with any agreement is the matter of its enforcement, *i.e.*, the question as to procuring the actual specific performance of the act concerning which the agreement was made, or the redress available if this is not feasible. In general, contracts are enforceable in equity according to their terms, unless there is an adequate remedy in a suit at law for money damages. The labor contract is an exception to the

¹ *McMillan v. Vanderlip*, 12 Johns. 165 (N.Y.); *Jennings v. Camp*, 13 Johns. 94 (N.Y.); *Davis v. Maxwell*, 12 Metc. 286 (Mass.).

² *Britton v. Turner*, 6 N.H. 481; *Pixler v. Nichols*, 8 Iowa 106; *Ricks v. Yates*, 5 Ind. 115; 2 Pars. Cont. pp. 40, 41. See sec. 8.

³ *Beach v. Mullin*, 34 N.J.L. 343; 2 Pars. Cont. p. 35.

general rule, no enforcement of the specific performance of merely personal services being granted,¹ because of the inability of the courts to supervise or insure their execution,² as well as because such enforcement would savor of involuntary servitude.³ An employee contracting to render exclusive services of a unique or extraordinary character,⁴ or whose breach of contract would involve the probable disclosure of trade secrets,⁵ may, however, be enjoined from rendering service to another during the period of time for which the previous contract was to run. The application of this remedy will be restricted to a reasonable length of time,⁶ though the restriction as to time does not apply to the matter of the disclosure of trade secrets, that not being construed as a contract in restraint of trade.⁷ A perpetual injunction will therefore lie against the disclosure of trade secrets by an employee who has been inducted thereinto under an agreement, express or implied, that they shall not be disclosed;⁸ and an employee is bound by such an agreement without regard to the methods by which he obtained his knowl-

¹ *Arthur v. Oakes*, 63 Fed. 310; *Roquemore & Hall v. Mitchell Bros.*, 167 Ala. 475, 52 So. 423; *Iron & Steel Co. v. Nichols*, 73 N.J. Eq. 684, 69 Atl. 186; Ga. Code, sec. 4919.

² *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467.

³ *Clark's Case*, 1 Blackford (Ind.), 122, 12 Am. Dec. 213.

⁴ *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Keith v. Kellermann*, 169 Fed. 196; *McCall v. Wright*, 198 N.Y. 143, 91 N.E. 516; *McCaull v. Braham*, 16 Fed. 37; Ga. Code, sec. 4919.

⁵ *Harrison v. Sugar Refining Co.*, 116 Fed. 304 (C.C.A.); *McCall v. Wright*, *supra*.

⁶ *Harrison v. Sugar Ref. Co.*, *supra*; *Iron & Steel Co. v. Nichols*, *supra*; see also *Marble Co. v. Ripley*, 77 U.S. (10 Wall.) 339.

⁷ *Jarvis v. Peck*, 10 Paige's Ch. 118 (N.Y.); *Taylor v. Blanchard*, 13 Allen 370 (Mass.), 90 Am. Dec. 203; *Thum v. Tloczynski*, 114 Mich. 149, 72 N.W. 140.

⁸ *Peabody v. Norfolk*, 98 Mass. 452; *Stone v. Goss*, 65 N.J. Eq. 756, 55 Atl. 736; *H. B. Wiggins' Sons Co. v. Cott-A-Lapp Co.*, 169 Fed. 150.

edge of the secret.¹ An agreement that is so broad as to preclude the disclosure or use of one's own secrets or discoveries made during employment, or of all the treatments and processes used by his employer, whether secret or not, is not enforceable by injunction.²

SECTION 8. *Violations of Contracts by Employees.*—Actions for damages are available for the violation of labor contracts as in the case of other broken contracts,³ though the damages must be shown to be actual in order to support a recovery.⁴ Inasmuch, however, as it is often true that a judgment against the employee will fail to secure returns, while one against the employer will have value, the consequence is that in such cases there is a condition in which one party can violate his contract without liability, while it is enforceable against the other. The practical effect of this condition is modified by the fact that the term of hiring is customarily indefinite and general and terminable at the will of either party. Compulsory servitude, which is prohibited by the thirteenth amendment to the Constitution of the United States, would be too nearly approached by a construction of law that would compel service beyond a voluntary rendition of it; while to compel employment would not be allowed, since that would be an infringement on the freedom of contract,⁵ which cannot be waived, even by contract.⁶

A peculiar provision found in the Field Code is one that seems to imply that a contract for two years or under can be enforced

¹ *Thum v. Tloczynski*, *supra*.

² *Iron & Steel Co. v. Nichols*, *supra*.

³ *Word v. Winder*, 16 La. Ann. 111; *Payne v. Western & Atlantic R. Co.*, 13 Lea 507 (Tenn.); *Hamblin v. Dinneford*, 2 Edw. Ch. 533 (N.Y.).

⁴ *Hasselman Printing Co. v. Fry*, 9 Ind. App. 393, 36 N.E. 863.

⁵ *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 334.

⁶ *Hilton v. Eckersley*, 6 Ell. & Bl. 47.

in the states adopting it, the law stating that, except in the case of apprenticeship, no contract can be enforced against an employee beyond the term of two years from the commencement of services under it.¹ This cannot be construed, however, as looking toward an enforcement of specific performance, which is prohibited by statute,² but only as setting a period to contracts giving rise to actions. It is not held to make the contract void as against the employer, but only to leave it to the election of the employee whether he will continue service thereunder. If he chooses to do so, he may also sue for the value of his services in an action on a quantum meruit, though the contract may be referred to by the employer as presumably fixing the value of the services contemplated.³

The unwarranted abandonment of a contract gives rise to the question of the recovery of unpaid wages earned by the employee before leaving service. Where the contract is entire, so that no part of it can be said to be completed before the entire work is finished, no recovery can usually be had.⁴ This rule has been incorporated in statute law.⁵ A contract for a fixed period, whatever its length, is an entire contract, and falls within the above rule.⁶ The rigor of this rule has been objected to in favor of an equitable recognition of the value of the portion of

¹ Cal., Civ. Code, sec. 1980. See Appendix.

² Cal., Civ. Code, sec. 3390.

³ *Stone v. Bancroft*, 139 Cal. 78, 72 Pac. 717.

⁴ *Hawkins v. Gilbert*, 19 Ala. 54; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Goldstein v. White*, 16 N.Y. Supp. 860; *Davis v. Maxwell*, 12 Metc. 286 (Mass.); *Dunn v. Moore*, 16 Ill. 151.

⁵ Ark. Dig. sec. 5028; *Latham v. Barwick*, 87 Ark. 328, 113 S.W. 646.

⁶ *Hildebrand v. Art Co.*, 109 Wis. 171, 85 N.W. 268; *Wright v. Turner*, 1 Stew. 29 (Ala.), 18 Am. Dec. 25; *Isaacs v. McAndrew*, 1 Mont. 437; *McMillan v. Vanderlip*, 12 Johns. 165 (N.Y.), 7 Am. Dec. 299.

the services rendered,¹ and a more lenient view is taken in a number of jurisdictions, allowing the employee to recover the value of the labor performed, less any damages caused by his failure to complete his contract.² It is the general rule that where an entire contract is broken by the sickness or death of the employee, or by his discharge, whether for cause or otherwise, he is entitled to recover the contract wages for the time served, less any damages resulting from his own misconduct;³ the same rule applies where the contract is severable,⁴ and an ordinary employment in which periodic payments are contemplated has been held to be of this class.⁵ In any case, wages paid before the breach cannot be recovered by the employer,⁶ nor can he refuse to pay a note given before the breach in payment of wages.⁷

SECTION 9. *Statutory Provisions for Enforcing Contracts.* — Not being enforceable in equity, and entailing only liability in damages for its violation, the refusal or failure by an employee to fulfill the terms of his contract is not a criminal act, apart from statutory enactment, nor is it a tort.⁸ A number of states, chiefly Southern, have laws relating to the enforcement of the labor contract, and providing for penalties for its violation. The Louisiana civil code, art. 2747, states that "A man is at

¹ *Britton v. Turner*, 6 N.H. 481.

² *Wheatly v. Miscal*, 5 Ind. 142; *Asher v. Tomlinson*, 22 Ky. L. Rep. 1494, 60 S.W. 714; *Duncan v. Baker*, 21 Kans. 99.

³ *Hildebrand v. Art Co.*, *supra*.

⁴ *Tichenor v. Bruckheimer*, 40 Misc. 194 (N.Y.); *White v. Atkins*, 8 Cush. 370 (Mass.).

⁵ *Walsh v. New York & Ky. Co.*, 85 N.Y. Supp. 83.

⁶ *Winn v. Southgate*, 17 Vt. 355.

⁷ *Thorpe v. White*, 13 Johns. 53 (N.Y.).

⁸ *Comerford v. Street Ry. Co.*, 164 Mass. 13, 41 N.E. 59.

liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause"; which is but a statement of the common law.¹ The next article provides, however, that "Laborers, who hire themselves out to serve on plantations or to work in manufactories, have not the right of leaving the person who hired them, nor can they be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just cause can be assigned." In case of an unjustifiable breach, forfeiture of all wages earned during the expired portion of his service is prescribed, if the act is that of the employee; or the forfeiture of the full wages for the term, if the act is that of the employer. If the employee is discharged for good cause, he is entitled to recover wages for the time served.² The law of Arkansas is practically the same as that of Louisiana.³

A form of legislation that has arisen in large part, no doubt, from local economic conditions of labor is one that has regard to contracts of employment where advances of money or supplies have been secured with fraudulent intent. These laws apply to goods advanced during the continuance of the contract as well as to those obtained at the time it is made. Thus in Alabama abandonment of the contract without repayment of such advances is punishable criminally as for the perpetration of a fraud by means of promises not intended to be kept.⁴ An intent to defraud must be shown, a mere breach of the contract

¹ *Boyer v. W. U. Tel. Co.*, 124 Fed. 246.

² *Nolan v. Danks*, 1 Robinson 332 (La.).

³ Dig. 1904, secs. 5027, 5028. See *Latham v. Barwick*, 87 Ark. 328, 113 S.W. 646.

⁴ Code of 1907, sec. 6845.

not being a crime;¹ and it is insisted that "the criminal feature of the statute consists in the entering into a contract with the intent to injure or defraud the employer, and the refusal of the employee to perform the contract, with a like intent."² The statute provided that refusal or failure without just cause to perform the act or render the service agreed upon, or to refund the money or value of the property advanced, was *prima facie* evidence of fraudulent intent; and this, with the other provisions of the statute, was held by the supreme court of the state to be constitutional.³ On appeal to the Supreme Court of the United States, however, this provision of the law was held to be repugnant to the provisions of the thirteenth amendment to the Constitution of the United States, prohibiting involuntary servitude, and to those of the peonage laws,⁴ inasmuch as they deprived the defendant of his presumption of innocence, and exposed him to conviction for fraud upon evidence only of a breach of contract and a failure to repay advances.⁵

¹ *Ex parte* Riley, 94 Ala. 82, 10 So. 528; *Bailey v. State*, 158 Ala. 18, 48 So. 498.

² *Bailey v. State*, *supra*; citing *Dorsey v. State*, 111 Ala. 40, 20 So. 629 and *McIntosh v. State*, 117 Ala. 128, 23 So. 668.

³ *State v. Vann*, 150 Ala. 66, 43 So. 357; *Bailey v. State*, 158 Ala. 18, 48 So. 498; same case, 161 Ala. 78, 49 So. 886.

⁴ U. S. R. S., secs. 1990, 5526.

⁵ *Bailey v. Alabama*, 219 U.S. 219, 31 Sup. Ct. 145. "The fact that the labor debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute [prohibiting peonage]. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service which the statute inhibits, for when that occurs, the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. The act of Congress deprives of effect all legislative measures of any state through which, directly or indirectly, the prohibited thing, to wit, compulsory service to secure the payment of a debt, may be established or maintained."

Other jurisdictions having laws of this tenor are Arkansas,¹ Florida,² Georgia,³ Louisiana,⁴ Michigan,⁵ Minnesota,⁶ New Mexico,⁷ North Dakota,⁸ and South Carolina.⁹ The laws of Michigan, Minnesota, and North Dakota seem to contemplate primarily the fraudulent procurement of transportation, though they include other forms of advances, and contain the provision making failure to repay *prima facie* evidence of fraud, thus bringing these laws within the strictures of the opinion of the Supreme Court in the Bailey Case. The charge had already been made against some of the laws of this class that they violate the national law prohibiting peonage, which is defined as a "status or condition of compulsory service, based upon the indebtedness of the peon to the master."¹⁰ The statute under discussion when this definition was given was an earlier one of Florida, and it was said by the Supreme Court of the United States that that which was contemplated by the law was compulsory service to secure the payment of a debt. This case was referred to in the course of an opinion in which a law of South Carolina¹¹ was declared unconstitutional by a Federal court as being in conflict with the thirteenth and fourteenth amendments of the Constitution of the United States, and laws made in pursuance thereof.¹² This statute was also held unconstitutional by the supreme court of the state of South Carolina in a case¹³ in which the opinion was very full, and in which a

¹ Acts of 1907, No. 271. ⁴ Acts of 1906, No. 54. ⁷ Acts of 1905, ch. 37.

² Acts of 1907, ch. 5678. ⁵ Acts of 1903, No. 106. ⁶ Acts of 1907, ch. 208.

³ Acts of 1903, p. 90. ⁸ R.L. 1905, sec. 5187. ⁹ Acts of 1908, No. 494.

¹⁰ *Clyatt v. U.S.*, 197 U.S. 207, 25 Sup. Ct. 429.

¹¹ *Crim. Code*, sec. 357, as amended by acts of 1904, No. 243.

¹² *Ex parte Drayton*, 153 Fed. 986.

¹³ *Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19. The dissenting opinion presents the economic reasons for laws of this class.

lengthy dissenting opinion was also written. In declaring this law unconstitutional, the court reversed the position it had held in earlier cases,¹ taking the ground that the statute violated the right of citizens to be exempt from imprisonment for debt except in cases of fraud, as provided in the state constitution; further, that it violated the thirteenth amendment of the Constitution of the United States, as its enforcement would lead to peonage or involuntary servitude; and the fourteenth amendment likewise, since it did not bear equally on the landlord and the laborer. The present law of South Carolina was enacted by the legislature of 1908 (Act No. 494), and is extended to include personal service of every kind, applying to employers who fail or refuse to receive and compensate personal service after contracting therefor, as well as to employees who fail or refuse to render such service. Fraud or malicious intent to injure is essential to the offense, the failure without sufficient cause to carry out the contract, to the injury of the other party, being *prima facie* evidence of fraud and malice. The law covers cases where advances are not received or promised, as well as others, though contracts based on debts incurred prior to the commencement of service thereunder are expressly declared null and void.

In laws where the repayment of advances is considered, it is contended in their favor that it is not against the laborer's breach of contract that the penalty lies, but against a misdemeanor, "as if he had stolen" the advanced property (Alabama); "he shall be deemed a common cheat and swindler" (Georgia); "shall be guilty of a misdemeanor," and be punished by fine or imprisonment (Michigan and Minnesota), etc.

¹ *State v. Williams*, 32 S.C. 124, 10 S.E. 876; *State v. Chapman*, 56 S.C. 420, 34 S.E. 961; *State v. Easterlin*, 61 S.C. 71, 39 S.E. 250.

It is claimed that the state has the right to penalize such breach, after the receipt of advances, as a punishment of fraud, and for the purpose of repressing fraudulent practices; and the laws have received judicial support on this ground.¹ The whole list of such laws apparently falls under the charge that was made against the Florida statute in the Clyatt case, above, — that their purpose is the compulsory payment of a debt, in which view they would come under the strictures of the same court set forth in another case, where it was said that a “mere statute to compel the payment of indebtedness does not come within the scope of police regulations.”² Their effect is, at least, ‘to expose the weak and unintelligent to oppression and injustice at the hands of the powerful and unscrupulous, — to offer easy possibilities of misuse for the collection of debts and the enforcement of civil contracts without regard to the intention of the defendant’;³ and they cannot be looked upon as valid, in view of the pronouncement in the Bailey case.⁴

As a means to the same end of enforcing the performance of the labor contract, the Alabama legislature enacted a law⁵ by which an employee under written contract for a specified time to work for another or to lease lands was prohibited from making a second contract without the consent of the first employer and without sufficient cause, to be adjudged by court, unless he should give notice of the preëxisting contract. The punishment was a fine or penal service. This act was declared unconstitu-

¹ *Vance v. State*, 128 Ga. 661, 57 S.E. 889; *State v. Murray*, 116 La. 655, 40 So. 930.

² *Gulf, etc., R. Co. v. Ellis*, 165 U.S. 157, 17, Sup. Ct. 257.

³ *Patterson v. State*, 1 Ga. App. 782, 58 S.E. 284.

⁴ *Bailey v. Alabama*, *supra*.

⁵ Acts of 1900–1901, No. 483.

tional, first by a Federal court,¹ and later by the supreme court of the state.² In the opinion of the court first named it was held that the act was a coercive weapon by which the employer would seek to compel the payment of a debt or the performance of a contract, in cases where only a suit for damages would lie; while the state court condemned the law because of the restrictions it undertook to place on the right to make contracts of employment.

The state of Mississippi has a statute³ of like tenor with the above, enacted in 1900, which does not appear to have yet received consideration at the hands of the higher courts, but is doubtless likewise invalid.

Employees engaged in the operation of railroad trains, and in Connecticut of street cars, who abandon the train or car at another point than its scheduled destination, are declared guilty of a misdemeanor in a number of states.⁴ In some cases the law applies only where there is a combination to strike, and in some to locomotive engineers only. A more general statute applies to any person violating his contract when he knows or has reason to believe that the probable consequences of his breach will be the endangering of life, the causing of bodily injury, or the exposure of valuable property to destruction.⁵ A law of another state provides that an employee of any sort on a steamboat who abandons the boat before the termination of his contract or who refuses to perform the work for which he

¹ Peonage Cases, 123 Fed. 671.

² *Toney v. State*, 141 Ala. 120, 37 So. 332.

³ Code of 1906, sec. 1147.

⁴ Conn., G.S. sec. 1293; Del., R. Code, p. 928; Ill., R.S. ch. 114, sec. 108; Kans., G.S. sec. 2374; Me., R.S. ch. 124, sec. 6; N.J., Acts 1903, ch. 257, sec. 62; Pa., B. P. Dig. p. 533.

⁵ N.Y., C.L. ch. 40, sec. 1910; Wash., Acts 1909, ch. 249, sec. 281.

contracted shall not only forfeit all wages due, but shall also be liable for all damages caused by his act.¹

Practically all the states have laws relating to apprentices and the regulation and enforcement of contracts with them. These laws generally prescribe the term of indenture, the duties of the master as to training, education, and the payment of the stipulated amount on the expiration of the term. The apprentice is required to complete his term, and enticing or harboring him or otherwise interfering with the relation of apprenticeship is forbidden. These laws are practically obsolete at the present time, contracts between employers and unskilled men or boys learning trades being for the most part governed by the rules of law generally applicable to labor contracts.

SECTION 10. *Seamen*. — A class of employees that stands on a different footing from any other is that of seamen, with reference to whom it has been held that enforced contracts are permitted, the law as to involuntary servitude not being applicable.² Many distinctive, legally recognized customs apply to them, as well as a special code of statutes, chiefly Federal,³ since the control of seamen belongs to Congress, being recognized as within the commerce clause of the Constitution.⁴ These laws and customs relate to the nature of the contract, the term of service, the payment, assignment, etc., of wages, advance payments, and credits, the regulation of sailors' lodging houses, of shipping masters, quarters on board ship, rations, and many other details.

The reason for these differences, which take seamen outside the control of the general laws affecting labor, is grounded in

¹ La., R.L. sec. 945.

² *Robertson v. Baldwin*, 165 U.S. 275, 17 Sup. Ct. 326.

³ R.S., secs. 4501 to 4612, Comp. Stat. 1901, pp. 3061 to 3125.

⁴ *Patterson v. The Eudora*, 190 U.S. 169, 23 Sup. Ct. 821.

ancient custom, and is defended on the view that the business of navigation requires some guaranties, beyond the ordinary civil remedies upon contracts, to effect their enforcement; and further, because of the manner of their life by reason of which seamen are peculiarly exposed and subjected to the will and caprice of the ship's officers on the one hand, and to designing and corrupt traders, etc., on land on the other. "Indeed, seamen are treated [by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians." ¹

On account of these differences, and their limited field of application, the conditions of employment of seamen will not be further considered.

SECTION 11. *Breach of Contract by the Employer.* — As already stated, a contract of employment is enforceable against the employer to the extent that damages may be recovered for the breach thereof, and an employee under contract is entitled to recover the wages agreed upon where the employer refuses to accept services in accordance with the terms of the contract.² If, however, the employee fails to show that he was ready and willing to render the services, or puts himself in a position where performance is not possible, he can enforce no claim;³ but tender of service after notice of discharge is not necessary.⁴

¹ *Robertson v. Baldwin*, *supra*.

² *Costigan v. R. Co.*, 2 Den. 609 (N.Y.).

³ *Polk v. Daly*, 4 Daly 411 (N.Y.); *Collins v. Hazelton*, 65 Mich. 220, 31 N.W. 843.

⁴ *Bacon v. New Home S.M. Co.*, 13 N.Y. Supp. 359; *McMullen v. Dickinson Co.*, 63 Minn. 405, 65 N.W. 661.

Of necessity, no question can arise as to the breach of a contract terminable at will. This rule has been carried so far as to hold that an employee who had left his place with his former employer and was proceeding under an agreement with a new employer and in compliance with his instructions, could recover no damages for the repudiation of the contract by the latter before the performance of any part of the contract, in the absence of proof of a stipulated term of employment.¹ The better reason would seem to support the position that a breach without giving the employee a chance to begin work gives him a right to at least nominal damages; since, even though the contract was for no definite time, it was for some time, and the actual performance of and payment for labor in some amount were contemplated.²

Where an employer breaks a contract of hiring for a specified time, the employee may wait until the expiration of the contract period and recover the amount of wages he would have earned but for his wrongful discharge, less what he earned or could have earned by employment elsewhere.³ It is held by the weight of authority that the burden of showing that the plaintiff was able to procure other employment rests on the defendant employer;⁴ though the question may be referred to the jury to decide from the circumstances as to the reasonable prospect of

¹ *Savannah, etc., R. Co. v. Willett*, 43 Fla. 311, 31 So. 246. See also *Merrill v. W. U. Tel. Co.*, 78 Me. 97, 2 Atl., 847.

² *Cronemillar v. Milling Co.*, 134 Wis. 248, 114 N.W. 432; *Burtis v. Thompson*, 42 N.Y. 246; *Utter v. Chapman*, 38 Cal. 659.

³ *Winkler v. Racine Wagon, etc., Co.*, 99 Wis. 184, 74 N.W. 793; *Efron v. Clayton*, 35 S. W. 424 (Texas Civ. App.); *Pierce v. R. Co.*, 173 U.S. 1, 19 Sup. Ct. 335; *Cutter v. Gillette*, 163 Mass. 95, 39 N.E. 1010.

⁴ *Mathesius v. R. Co.*, 96 Fed. 792; *Wilkinson v. Black*, 80 Ala. 332; *Hamilton v. Love*, 43 N.E. 873 (Ind.); *Maynard v. Corset Co.*, 200 Mass. 1, 85 N.E. 877.

the discharged employee's procuring employment during the unexpired term of his contract.¹ In some states the burden is shifted to the plaintiff.² While it is the plaintiff's duty to use reasonable efforts to avoid loss by securing employment, he is not bound to accept new employment of a nature essentially different from that for which he was originally employed,³ even from his former employer.⁴

Instead of suing for the wages that would have been earned but for the breach of the contract, the remedy prescribed in some jurisdictions is an action for the damages caused by the breach.⁵ This suit may be brought either immediately or at the expiration of the term.⁶ The measure of damages recoverable will usually be the contract price for the labor.⁷ In jurisdictions where suits for wages are allowed, the employee may choose which of the two remedies he will pursue.⁸ The rule in Louisiana is to the effect that the right to recover wages for the unexpired term of the contract becomes vested at once on its unwarranted breach by the employer, and is not affected either by the acceptance of other employment or by a refusal to return

¹ *Moore v. Central Foundry Co.*, 68 N.J.L. 14, 52 Atl. 292.

² *John C. Lewis Co. v. Scott*, 95 Ky. 484, 26 S.W. 192; *Hunt v. Crane*, 33 Miss. 669, 69 Am. Dec. 381.

³ *Leatherberry v. Odell*, 7 Fed. 641; *Fuchs v. Koerner*, 107 N.Y. 529, 14 N.E. 445.

⁴ *De Loraz v. McDowell*, 68 Hun. 170, 22 N.Y. S. 606; *Jackson v. School District*, 111 Iowa 20, 77 N.W. 860.

⁵ *Weed v. Burt*, 78 N.Y. 191; *Stone v. Bancroft*, 112 Cal. 653, 44 Pac. 1069.

⁶ *Hamilton v. Love*, *supra*; *Olmsted v. Bach*, 78 Md. 132, 27 Atl. 501; *James v. Allen Co.*, 44 Ohio St. 226, 6 N.E. 246.

⁷ *Lambert v. Hartshorne*, 65 Mo. 549; *Fuller v. Little*, 61 Ill. 21; *Hamilton v. Love*, *supra*.

⁸ *Fowler v. Armour*, 24 Ala. 194; *Mullaly v. Austin*, 97 Mass. 30; *Tyler Cotton Press Co. v. Chevalier*, 56 Ga. 494; *McLean v. Pub. Co. (N.D.)*, 129 N.W. 93.

to work under the original contract;¹ but this doctrine is grounded on the peculiar statute of the state,² and is not in line with the commonly accepted rules of law elsewhere.

Where an employee had an option on permanent employment by reason of a contract entered into in consideration of forbearing to sue for damages on account of an injury, and he is discharged without cause, he may sue for loss of earnings since his discharge, and for such earnings as would have been received in the future, less probable earnings in other employment.³

SECTION 12. *Grounds for Discharge.* — If the employer can successfully defend his course of action in discharging an employee under contract, no damages will be allowed, and, apart from special provisions in the contract, the question whether the discharge was warranted or not is one for the jury.⁴ A workman of adult age undertaking to do a piece of work is presumed to be competent, and incompetency is a sufficient ground for discharge, whether he made representations as to his competency,⁵ or whether it was merely presumed.⁶ The word "competency," as used in this connection, is not to be taken in an absolute sense, however, and imports nothing more than reasonable skill.⁷ Where an employer alleges incompetence as the ground for breaking a contract, the burden of proof is on him.⁸

¹ *Curtis v. A. Lehman Co.*, 115 La. 40, 38 So. 887; *Camp v. Baldwin-Melville Co.*, 123 La. 257, 48 So. 927.

² La., Civ. Code, art. 2749.

³ *Rhoades v. Chesapeake & O.R. Co.*, 49 W. Va. 494, 39 S.E. 209.

⁴ *Lippus v. Watch Co.*, 7 N. Y. Supp. 478; *Echols v. Fleming*, 58 Ga. 156.

⁵ *Mexican Amole Soap Co. v. Clark*, 72 Ill. App. 655; *Anstee v. Ober*, 26 Mo. 665.

⁶ *Lyon v. Pollard*, 20 Wall. 403 (U.S.); *Keedy v. Long*, 71 Md. 385, 18 Atl. 704.

⁷ *Crescent Horseshoe Co. v. Eynon*, 95 Va. 151, 27 S.E. 935; *Walton v. Godwin*, 58 Hun 87, 11 N.Y. Supp. 391.

⁸ *Mexelbaum v. Limberger*, 78 Ga. 43, 3 S.E. 257; *Franklin v. Lumber Co.*, 66 W. Va. 164, 66 S.E. 225.

An employee must, however, perform the duties for which he contracted with a degree of skill suited to the terms of his contract for the undertaking in hand, and he cannot, if discharged for incompetency, plead performance with ordinary skill.¹

Where a contract is for a definite term, and a provision is made that the service shall be satisfactory to the employer, the decision of the latter is final if he is in good faith dissatisfied;² though in some cases it is held that the employer is the sole judge, and that no question of good faith can be raised.³ This is opposed by the view held in a case involving the breach of a contract for permanent employment, conditioned on the employee giving satisfaction to his foreman or superintendent; it was here said that the burden of proof was on the employer to show good cause for the discharge, the appellate court refusing to set aside a verdict of the trial court in the discharged employee's favor.⁴ If the dissatisfaction is genuine, it is not material that it is not well founded;⁵ nor is the employer restricted, in his defense to an action, to the cause originally assigned as the reason for the discharge, but may adduce other reasons,⁶ even if they were not known to him at the time of the discharge.⁷

One state undertakes to regulate discharges by providing that

¹ *Hatton v. Mountford*, 105 Va. 96, 52 S.E. 847.

² *Koehler v. Buhl*, 94 Mich. 496, 54 N.W. 157; *Frery v. Rubber Co.*, 52 Minn. 264, 53 N.W. 1156; *Mackenzie v. Minis*, 132 Ga. 323, 63 S.E. 900.

³ *Allen v. Compress Co.*, 101 Ala. 574, 14 So. 362; *Crawford v. Pub. Co.*, 163 N.Y. 404, 57 N.E. 616.

⁴ *Rhoades v. Chesapeake & O.R. Co.*, 49 W. Va. 494, 39 S.E. 209.

⁵ *Mackenzie v. Minis*, *supra*.

⁶ *Corgan v. Coal Co.*, 218 Pa. 386, 67 Atl. 655.

⁷ *Von Heyne v. Tompkins*, 89 Minn. 77, 93 N.W. 901; *Loos v. Brewing Co.*, 145 Wis. 1, 129 N.W. 645. See Wood's "Master and Servant," 2d ed., sec. 121.

no employee between the ages of eighteen and sixty shall be discharged solely on account of age.¹

In a general contract of hiring, without reference to the term, an agreement not to suspend or discharge without just and sufficient cause is not a restriction against discharge at the employer's option;² but if the employment is for a term, the mere fact of general misconduct on the part of the employee is not sufficient ground for discharge unless it is made to appear that it is misconduct in connection with his employment or is of such a nature as to prejudice his employer's interests.³ Willful disobedience of reasonable and lawful orders,⁴ or other violation of the implied terms of the contract (sec.1), as well as violation of its express terms, will, if proved, generally be a sufficient defense for an employer in an action for damages for a breach of the contract. If it can be shown that the disobedience was not of a nature to injuriously affect his employer, it has been held that the employee may still recover damages, as he is entitled to some measure of self-direction,⁵ especially if skilled.⁶

It will be regarded as a breach of the contract by the employer if he violates its terms, express or implied, as by requiring other service than that contracted for;⁷ though it has been said that this alone will not amount to a breach, so long as the employee is permitted to perform the work for which he was hired;⁸ nor,

¹ Colo., Supp. sec. 2801c2.

² St. Louis, I. M. & S. R. Co. v. Mathews, 64 Ark. 398, 42 S.W. 902.

³ Child v. Boyd, etc., Mfg. Co., 175 Mass. 493, 56 N.E. 608.

⁴ Forsyth v. McKinney, 56 Hun 1, 8 N.Y. Supp. 561.

⁵ Shaver v. Ingham, 58 Mich. 649, 26 N.W. 162; Hamilton v. Love, 43 N.E. 873 (Ind.).

⁶ Park v. Bushnell, 60 Fed. 583, 9 C.C.A. 138.

⁷ Baron v. Placide, 7 La. Ann. 229.

⁸ Koplitz v. Powell, 56 Wis. 671, 14 N.W. 831.

on the other hand, can the employee's refusal to do work outside the scope of his employment be made a ground for discharge.¹ Where the order to do the new work is coupled with a refusal to permit the performance of the work contracted for, there is a breach for which an action will lie;² so also where the employer restricts the employee's rights under the contract,³ or does other acts prejudicial to the employee's safety, morals, or reputation. The modification of the conditions of employment is in effect making a new contract, and will involve the necessity of proving a sufficient consideration to support it.⁴ In case of a contract terminable at will, continuance in employment with knowledge of the modification is considered an acceptance of the new terms.⁵ Neither party can recover damages for the breach of a contract which contravenes public policy.

SECTION 13. *Other Methods of Dissolving the Contract Relation.* — Besides abandonment of the contract by the employee or its breach by the employer, ordinary contracts of employment may be terminated, without entailing liability on either party beyond the payment of wages earned up to the time of dissolution, by mutual consent;⁶ by the expiration of the contract period, after which an employee seeking to recover wages for services rendered must show that the contract was renewed or extended, either expressly or by implication;⁷ by the death

¹ *Loos v. Brewing Co.*, *supra*; *Koplitz v. Powell*, *supra*.

² *Cooper v. Stronge & Warner Co.*, 111 Minn. 177, 126 N.W. 541; *Marx v. Miller*, 134 Ala. 347, 32 So. 765.

³ *Baldwin v. Marqueze*, 91 Ga. 404, 18 S.E. 309.

⁴ *Davis v. Morgan*, 117 Ga. 504, 43 S.E. 732.

⁵ *Norton v. Brookline*, 181 Mass. 360, 63 N.E. 930.

⁶ *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564.

⁷ *Ewing v. Janson*, 57 Ark. 237, 21 S.W. 430.

or continued sickness of the employee;¹ or by the occurrence of some event for which neither party is responsible, which makes the rendering of the service impossible or unreasonable and out of consonance with the original intent of the parties.² The mere fact that an undertaking develops greater difficulties than were contemplated at the time the contract was entered into will not operate to dissolve it, however,³ but for an employer to refuse to accept services except of a nature and under conditions violative of the terms of the contract is in effect a breach,⁴ for which the employer is liable as above stated. (Sec. 11.)

While the death or sickness of an employee, preventing the fulfillment of a contract, operates to terminate it, the assumption being that the contract is for his personal services and not for those of a substitute to be furnished by him or his personal representative,⁵ the rule is not well fixed where the case is one of the death of the employer. Some authorities hold that the relation is so strictly a personal one that the death of the employer effects a dissolution,⁶ while in other cases a contrary position has been taken.⁷ Acceptance of services, either by a surviving partner or by the personal representative of the decedent,

¹ *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Clark v. Gilbert*, 26 N.Y. 283, 84 Am. Dec. 189.

² *Jones v. Judd*, 4 N.Y. 411.

³ *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 161; *Carr v. Coal Co.*, 25 Pa. St. 337.

⁴ *Curtis v. A. Lehman Co.*, 115 La. 40, 38 So. 887; *Marx v. Miller*, 134 Ala. 347, 32 So. 765.

⁵ *O'Connor v. Briggs*, 182 Mass. 387, 65 N.E. 836.

⁶ *Lacey v. Getman*, 119 N.Y. 109, 23 N.E. 426; *Griggs v. Swift*, 82 Ga. 392, 14 Am. St. Rep. 176; *In re McPhce's Estate*, 156 Cal. 335, 104 Pac. 455. Cal. Civ. Code, sec. 1996.

⁷ *Phoebe v. Jay*, 1 Ill. 268; *Hill v. Robeson*, 10 Miss. 541.

would at least entitle an employee to a quantum meruit,¹ while other courts exact payment as provided for by the original contract.² The insolvency of an employer occurring after the formation of a contract does not put an end thereto,³ nor does his insanity,⁴ though as to matters of the latter nature, it may be said that considerations that are personal to individual employers are of less general importance with the enlargement of the scope of the operations of incorporated concerns in the conduct of business.

Either custom or contract may provide for the rescission of the contract by notice. In such cases the law favors mutuality, so that employer and employee shall stand on an equal footing as to length of notice required and the forfeiture of wages, which is the usual penalty for the violation of the agreement.⁵ A usual custom is one that requires notice for a length of time equal to the interval between pay-days. Where a rule of the employer is offered in evidence, it is for the jury to decide whether the employee was properly instructed as to such rule so as to be bound thereby.⁶ Failure to give notice in accordance with the terms of a contract is such a violation thereof as to prevent the recovery of wages earned before the breach;⁷ though it has been held that the abandonment of a contract without having given the agreed notice does not forfeit the wages earned, but only makes the employee liable for any dam-

¹ *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095.

² *Toland v. Stevenson*, 59 Ind. 485; *Ferira v. Sayres*, 5 Watts & S. 210 (Pa.), 40 Am. Dec. 496.

³ *In re Silverman*, 101 Fed. 219; *Vanuxem v. Bostwick*, 4 Pa. Cas. 532, 40 Am. Dec. 598.

⁴ *Sands v. Potter*, 165 Ill. 397, 56 Am. St. Rep. 253.

⁵ *Fawcett v. Cash*, 5 B. & Ad. 904.

⁶ *Diamond State Iron Co. v. Bell*, 2 Marvel 303 (Del.), 43 Atl. 161.

⁷ *Naylor v. Iron Works*, 118 Mass. 317.

ages caused by such abandonment.¹ The employer is liable in damages to an employee discharged without the agreed notice, the measure of damages being the wages the employee would have earned during the period of the notice, subject to the same rules as in the case of the violation of a contract for a fixed period; ² so also an employee quitting without notice in violation of his agreement will be held to a contract to forfeit the wages for the period agreed upon.³

The matter of notice has been made the subject of legislation in a few states, the uniform provision of the laws being that the obligations as to time of notice and amount of forfeiture shall be reciprocal; ⁴ while a Connecticut statute ⁵ prohibits the retention of wages because of failure to give notice, even where there was an agreement requiring notice to be given.

SECTION 14. *Clearance Cards.* — The practice of asking for a clearance card or a letter of recommendation before engaging an applicant for employment does not, in the absence of custom, affect employers to the extent of requiring them to furnish such cards or letters to employees at the termination of their employment.⁶ If, however, there is a custom to give such cards, and the contract was made with mutual knowledge thereof, an action lies for the failure to give one on the discharge of an employee.⁷ The courts will take judicial cognizance of the fact

¹ Hunt v. Otis Co., 4 Metc. 464 (Mass.).

² Babcock v. Appleton Mfg. Co., 93 Wis. 124, 67 N.W. 33.

³ Fisher v. Walsh, 102 Wis. 172, 78 N.W. 437; Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.

⁴ Me., R.S. ch. 40, sec. 51; Mass. Acts 1909, ch. 514, sec. 120; N.J., G.S. p. 2351, Acts 1904, ch. 64, sec. 27; Pa., B. P. Dig. p. 2073; R.I., G.L. ch. 198, sec. 25; Wis., A.S., sec. 1728m.

⁵ G.S. sec. 4694.

⁶ New York, C. & St. L. R. Co. v. Schaffer, 65 Ohio St. 414, 62 N.E. 1036; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 51 N.E. 811.

⁷ Hundley v. Louisville, etc., R. Co., 105 Ky. 162, 48 S.W. 429.

that such a card is not necessarily a recommendation, but is rather a statement of the cause of the termination of the employment, together with such other facts, whether favorable or unfavorable to the employee, as the employer may see fit to incorporate.¹ Malicious falsity of statement, or even known falsity without malice, would probably give a right of action against an employer making such statements as to the reason for discharge, at least where they result in preventing the employee from securing employment.²

The legislatures of some states have undertaken to compel the furnishing of a statement of the cause of discharge, when requested by the employee.³ In a case in which the constitutionality of a statute of this character was challenged, the court held that as the desired credentials were intended not for public, but for private information, the law commanding that they be furnished was void, as violating the right of the liberty of silence, which is involved in the right of the liberty of speech; saying that "compulsory private discovery, even from corporations, enforced, not by suit or action, but by statutory terror, is not allowable where rights are under the guardianship of due process of law."⁴ By like reasoning the supreme court of Kansas held that a similar law was unconstitutional;⁵ while a lower court of the state of Ohio held that failure to furnish an employee with a written statement of the reason for his discharge did not make the employer liable in a civil action for the penalty

¹ Cleveland, C. C. & St. L. R. Co. v. Jenkins, *supra*; McDonald v. Illinois C. R. Co., 187 Ill. 529, 58 N.E. 463.

² Hundley v. Louisville, etc., R. Co., *supra*.

³ Fla., G.L. sec. 2856; Ind., A.S. sec. 7078; Mo., Acts 1905, p. 178; Mont., A.C. sec. 3392; Ohio, Gen. Code, sec. 9012; Texas, Acts 1907, ch. 67.

⁴ Wallace v. Georgia, C. & N. R. Co., 94 Ga. 732, 22 So. 579.

⁵ Atchison, T. & S. F. R. Co. v. Brown, 80 Kans. 312, 102 Pac. 459.

provided for the violation of the statute, thereby making the law of no effect.¹ The Texas statute cited above was sustained as a constitutional enactment in a case in which the doctrine of the Wallace case was expressly rejected, and a judgment for damages against a railroad company for refusing to state fairly the reason for an employee's discharge affirmed.² Without discussing the constitutionality of the statute, this judgment was, on appeal, reversed, since the employer need only state truly his reason for discharge, without detail as to circumstances, even though another person might draw a different conclusion therefrom as to the nature of the employee's conduct.³

In a few states the forgery of employers' certificates or clearance cards is specifically made an offense.⁴

SECTION 15. *Procuring Breach of Contract.* — If a third person unjustifiably interferes with a contract of employment, either by persuading an employee to break a known contract, or by procuring the discharge of an employee, the injured party has a right of action against such person for damages caused by his interference.⁵ And this is true even though the contract was terminable at the option of the parties.⁶ It is therefore of no advantage to the defendant to show that the employer himself

¹ Crall v. Toledo & O. C. R. Co., 7 C. C. Rep. 132.

² St. Louis S. W. R. Co. v. Hixon, 126 S.W. 338 (Tex. Civ. App.).

³ Same case, 137 S. W. 343 (Tex.).

⁴ Ga., Acts 1899, p. 79; Minn., R.L. sec. 5053; Wis., A.S. sec. 4464b.

⁵ Lumley v. Gye, 2 El. & Bl. 216; Jones v. Leslie, (Wash.) 112 Pac. 81; Bixby v. Dunlap, 56 N.H. 456, 22 Am. Rep. 475; Walker v. Cronin, 107 Mass. 555; Angle v. Chicago, etc., R. Co., 151 U.S. 1, 14 Sup. Ct. 240; Huskie v. Griffin, 75 N.H. 345, 74 Atl. 595.

⁶ Chipley v. Atkinson, 23 Fla. 206, 1 So. 934; Lucke v. Clothing Cutters, etc., 77 Md. 396, 26 Atl. 505; *Per contra*, Holder v. Cannon Mfg. Co., 138 N.C. 308, 50 S.E. 681.

incurs no liability by discharging his employee;¹ nor is it material, so far as the right of action of a discharged person is concerned, whether his discharge is procured by fraud or intimidation, or merely by successful persuasion.²

In an action by an employee to procure damages for causing his discharge, the declaration is usually made that it was willfully and maliciously procured; but this signifies nothing more than that the act was knowingly done to the apparent damage of the person discharged, and without lawful justification on the part of the instigator, *i.e.*, as of competition in trade or employment.³ Where the defendant did nothing more than to answer an inquiry of an employer, stating such facts as led to the discharge of the plaintiff, no damages can be recovered.⁴ So the mere imparting of information, in the absence of fraud or coercion, gives rise to no liability, though it in effect leads to a discharge.⁵ The question of motive may be properly considered, and may be decisive in a given case,⁶ though the mere fact of bad intent does not make that actionable which does not amount to a legal injury.⁷ Where, however, there is an improper and malicious motive, not only actual but also exemplary damages may be recovered.⁸ The communication to the employer need not be libelous *per se*, but if it is effective in procuring the

¹ *Moran v. Dunphy*, 177 Mass. 485, 59 N.E. 125.

² *Moran v. Dunphy*, *supra*.

³ *Haskins v. Royster*, 70 N.C. 601, 16 Am. Rep. 780; *London Guarantee, etc., Co. v. Horn*, 206 Ill. 493, 69 N.E. 526.

⁴ *Wabash R. Co. v. Young*, 162 Ind. 102, 69 N.E. 1003.

⁵ *Baker v. Insurance Co.*, 23 Ky. L. R. 1174, 1178, 64 S.W. 913, 967.

⁶ *Moran v. Dunphy*, *supra*; *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N.E. 539; *Plant v. Woods*, 176 Mass. 504, 57 N.E. 1011.

⁷ *Allen v. Flood*, 67 L.J.Q.B. 119.

⁸ *Gibson v. Fidelity & Casualty Co.*, *supra*.

discharge of the employee to his loss and damage, its publication is actionable.¹ Where, however, a discharge is procured on the basis of representations as to misconduct on the part of an employee, the charges being verified on investigation by the employer, the informant is not liable in damages, nor does the fact that he bore ill will to the discharged employee make him so.² In fact, some courts have denied that motive should be considered in connection with cases of this nature,³ since if an act is injurious and unlawful, it is actionable, irrespective of motive, and whether malicious or not; while if not unlawful or injurious, it is not actionable, however maliciously performed.⁴ In another case it was said that motive is immaterial where the acts considered are lawful, but if done without legitimate interests to protect, it is unlawful to maliciously injure another's business.⁵ The differences would seem to be more apparent than real, though obviously some courts lay considerable stress on the question of motive; but the rule seems well stated in a British case, in which it was said that an act which does not amount to a legal injury cannot be actionable because done with a bad intent.⁶

So if an employer brings action on the ground of enticement, he must show that the act was willful or intentional, and that it did injure, or was calculated to injure him, the actor being without a justifiable cause. Malice is said to be of the essence of

¹ *Hollenbeck v. Ristine*, 105 Iowa, 488, 75 N.W. 355.

² *Lancaster v. Hamburger*, 70 Ohio St. 156, 71 N.E. 289.

³ *Macauley v. Tierney*, 19 R.I. 255, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N.W. 1119.

⁴ *Payne v. Western & Atlantic R. Co.*, 13 Lea 507 (Tenn.).

⁵ *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N.W. 737.

⁶ *Stevenson v. Newnham*, 13 C.B. 285; *Allen v. Flood*, *supra*.

such an action, but the charge of malice is supported by showing that there was notice of the contract of employment, and that the employee has been persuaded not to enter into or continue in the service contemplated thereby. The retention of an employee whose services are due to another under an existing contract, after knowledge of such contract, even though the second employer did not know at the time of the engagement that such a contract was in existence, is ground for action.¹ Contracts for piece work, where the work-agreed for is abandoned in an incomplete condition, are on the same footing as contracts for a fixed term.² This principle is held also to apply to employees engaged for a season, as for the making of a crop.³

Where a contract has been entered into, it is not necessary for the maintenance of an action that the rendition of the service be actually begun;⁴ but there must be a knowledge of the contract, since intent to deprive the employer of service must be shown.⁵ Where service is actually being rendered, there need not be a binding contract to support the action, since the employer is none the less entitled to at least the opportunity for the services of an employee merely at will⁶ or one under a contract which could not be enforced against him, as of a minor, without being required to submit to officious interruptions by third parties.⁷ But a mere attempt without damage will support no action.⁸ Where the employee has violated a void-

¹ *Butterfield v. Ashley*, 6 Cush. 249 (Mass.); *Campbell v. Cooper*, 34 N.H. 49.

² *Walker v. Cronin*, 107 Mass. 555.

³ *Haskins v. Royster*, 70 N.C. 601, 16 Am. Rep. 780; *Daniel v. Swearengen*, 6 S.C. 297, 24 Am. Rep. 471.

⁴ *Lumley v. Gye*, 2 El. & Bl. 216.

⁵ *Butterfield v. Ashley*, *supra*.

⁶ *Salter v. Howard*, 53 Ga.; *Frank v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152.

⁷ *Wood, M. & S.*, 2d ed., sec. 234; *Keane v. Boycott*, 2 H. Bl. 511.

⁸ *Hool v. Dorroh*, 75 Miss. 257, 22 So. 829.

able contract of his own volition, or left service under a contract at will, no action lies against a subsequent employer;¹ so also if there is an agreement to employ at the expiration of a term of hiring, even though otherwise a renewal of the contract might reasonably be expected.²

SECTION 16. *Statutes Forbidding Interference with Contracts.* — The same economic conditions that led to the enactment of laws which attempt to prevent the violation of contracts, especially where advances are involved, doubtless give rise to laws directed against the enticement of employees who are under contract for a given time.³ These aim their penalties at "any person who knowingly interferes with, hires, employs, entices away or induces" an employee to leave the service of another, or similar acts less particularly enumerated, and have been held constitutional.⁴ The attempt entails the same penalty as the actual performance under the Alabama and Georgia statutes. The penalties are either fine or imprisonment, and may or may not be coupled with a liability for any advances made to the inveigled employee, or for damages suffered by reason of the commission of the prohibited act. The right of action in damages is the only redress given in some states, thus making it only civilly and not criminally actionable.

In so far as this action alone is contemplated, the statute only

¹ *Langham v. State*, 55 Ala. 114; *Campbell v. Cooper*, 34 N.H. 49.

² *Boston Glass Co. v. Binney*, 21 Mass. (4 Pick.) 425.

³ Ala. Code, sec. 6850; Ark., Acts, 1905, No. 298; Fla., G.S., sec. 3232; Ga., Penal Code, secs. 121, 122. Act No. 390, Acts of 1901; Ky. Stat., sec. 1349; La., Acts, 1906, No. 54; Miss., Code, sec. 1146; S.C., Cr. Code, sec. 359; N.C., Revisal, sec. 3365; Tenn., Code, sec. 4337.

⁴ *Tarpley v. State*, 79 Ala. 271, *Murrell's Case*, 44 Ala. 367; *Hool v. Dorroh*, 75 Miss. 257, 22 So. 829. *Hightower v. State*, 72 Ga. 482; *Per contra*, *Peonage Cases*, 123 Fed. 671 (Ala. Stat.).

enforces the common law right, and actual damage must still be shown.¹ Damages recoverable do not include debts due the employer or landlord.² The statute may prohibit the enticement of any one to leave his employer, or hiring him before the expiration of his contract, without the consent of the employer. Under this law there is no offense where the employee has not actually entered on the service.³ On the other hand, a second employer has been held liable for employing one before the expiration of his contract, regardless of the fact that the employee had already broken his contract,⁴ the statute prohibiting such employment without the former employer's consent. This agrees with the doctrine of the case at common law of *Butterfield v. Ashley*, *supra*. In other cases⁵ it was held that there was no ground for criminal action for the mere employment of one who had left his former master. A statute of the United States on this subject makes it an offense to procure or entice any artificer or workman employed by the United States in any arsenal or armory to depart from his work during the term of his contract of employment, or, after notice of such contract, to retain, hire, or conceal such workman.⁶ It is obvious that such statutes must be construed strictly according to their language, so that no generally applicable rule can be laid down.

The interference may be prohibited no less for the safety of

¹ *Hool v. Dorroh*, *supra*.

² *Chrestman v. Russell*, 73 Miss. 452, 18 So. 656.

³ *Hendrix v. State*, 79 Miss. 368, 30 So. 708.

⁴ *Armistead v. Chatters*, 71 Miss. 509, 15 So. 39. See also *Tarpley v. State*, *supra*.

⁵ *Jackson v. State*, 16 So. 299 (Miss.); *Morris v. Neville*, 79 Tenn. (11 Lea) 271.

⁶ 35 Stat. 1097, Comp. Stat. Supp. p. 1404.

person and property than for the sake of procuring the completion of a labor contract as ordinarily understood. Laws of this sort are to be found in connection with mine regulations, forbidding the intimidation of or the interference with hoisting engineers;¹ or with the performance of the duties of railroad employees,² or of employees of other quasi-public corporations.³

The giving of gifts or gratuities to an employee with intent to influence him in relation to his employer's business, or the acceptance by employees of such gifts is prohibited by statutes of recent enactment in a number of states;⁴ so also of bonuses or discounts to employees who purchase supplies or materials for their employers, under most of the laws cited; the same prohibition may be applied to the giving or receiving of tips in hotels or on common carriers.⁵ A dealer allowing an employee a discount in violation of such a statute cannot recover anything on his contract, the entire contract being made void by the illegal act of granting discount.⁶

While these statutes are mentioned here on account of their close relation to each other, it is clear that they are not all designed strictly to prevent interference with employment, but to protect in a manner the financial interests of the employer and of the public.

Where intimidation is practiced in the interference, not only is there civil liability, but such conduct is declared a penal offense

¹ Ala., Code, sec. 1029; Ind., Acts 1905, ch. 50, sec. 10.

² Del., R.C. p. 928; Ill., R.S. ch. 114, sec. 109; Kans., G.S. sec. 2375.

³ Me., R.S. ch. 124, sec. 9.

⁴ N.J., Acts 1909, ch. 284; Wash., Acts 1909, ch. 249, secs. 426, 427; Conn., Acts 1905, ch. 99; Iowa, Acts 1907, chs. 183, 184; N.Y., C.L. ch. 40, sec. 439.

⁵ Wash., Acts 1909, ch. 249, secs. 439, 440.

⁶ General Tire Repair Co. v. Price, 115 N. Y. Supp. 171.

by the statutes of a number of states. Inasmuch as this phase of the question is frequently introduced into cases involving the activities and rights of strikers, its discussion will be deferred until the subject of labor organizations is taken up.

SECTION 17. *Right of Employer to Recover for Injuries to Employee.* — A doctrine that is obviously rooted in the older view of close personal relationships is one that gives the employer a right of action against a third person who injures his employee in such wise as to deprive the employer of his services.¹ The employer's right to recover does not interfere with the employee's right to sue the same party for damages for such personal injuries as he may have received.² This doctrine, like that which allows a suit by an employer for the seduction of a female employee³ or for libel injuring the employee's character,⁴ is grounded on the view that the employer has an interest or property in the services of one in his employment; so that where he is deprived of them, or their value is diminished, the employer is entitled to redress, actual loss being necessarily proved to support an action.⁵

A statute that may be noticed under this general head is one that gives employers a right of action against persons selling liquor to employees, producing intoxication and consequent damage to the employer.⁶ Such laws may or may not require previous notice not to sell; they are to be strictly construed,

¹ *Woodward v. Washburn*, 3 Den. 369 (N.Y.); *McCarthy v. Guild*, 12 Metc. 291 (Mass.).

² *Rogers v. Smith*, 17 Ind. 323.

³ *Furman v. Applegate*, 23 N.J.L. 28; *Nickelson v. Stryker*, 10 Johns. 115 (N.Y.); *Hewitt v. Prime*, 21 Wend. 79 (N.Y.).

⁴ *Riding v. Smith*, 13 Albany L. J. 441.

⁵ *Fluker v. R. Co.*, 81 Ga. 461, 8 S.E. 529.

⁶ Wash., A.C. sec. 2945; Mass., R.L. ch. 100, sec. 63.

and where they give a right of action for damages only, no other proceedings can be had under the statute, as by way of injunction to abate a nuisance, since the employer has no such property in his workmen as to entitle him to a writ against one keeping open a place to which they voluntarily resort.¹

SECTION 18. *Civil Rights of Employees.* — A majority of the states of the Union have enacted laws whose object it is to protect workmen in their contracts of employment while exercising their rights as citizens. Such laws may be broad enough in their terms to prohibit employers from interfering with their employees in the exercise of "any natural right or any right or privilege of citizenship;"² or they may, as is most frequently the case, direct their prohibitions against interferences with the exercise of the right to vote, either by demanding an inspection of the employee's ballot,³ or by printing on the pay envelopes in use the names of candidates, or mottoes, arguments, or threats intended to influence the political action of employees, or the posting of any handbill or notice stating that, in case of the success of any particular candidate or party, the establishment will close.⁴ Threats of dismissal or reduction of wages on account of an employee's vote,⁵ or interfering with his candidacy for office,⁶ or otherwise attempting to influence his action may also be made an offense. One state prohibits the appointment of an employer, manager, or foreman of railroad, mining,

¹ Northern P. R. Co. v. Whalen, 149 U.S. 157, 13 Sup. Ct. 822.

² Minn., R.L. sec. 5173.

³ Ala., Code, secs. 6804, 6805.

⁴ Cal., Penal Code, sec. 59; N.Y., C.L. ch. 40, sec. 772; S.D., Pen. Code, sec. 62.

⁵ Conn., G.S. sec. 1700; Idaho, Pen. Code, sec. 4585; Ind., A.S. sec. 2341; Ky. Stat. sec. 1574A.

⁶ Wyo., R.S. sec. 2523."

or manufacturing work carried on in the precinct, as judge, clerk, or watcher at the polls in any election.¹ Many of these laws provide that time to vote shall be allowed employees, either a fixed number of hours or a half day; or the day of election may be declared a legal holiday.

Employers are forbidden by the laws of a few states to discharge employees on account of their membership in the National Guard, or to refuse them permission to drill or perform active service when ordered out.² Interference with such members in their employment, or with their employers in their business may likewise be forbidden; also discrimination against such workmen by labor organizations on account of their membership.³

¹ Colo., A.S. Supp., secs. 1625w1/3, 1625w1/4.

² Kans., G.S., sec. 4058; Wash., Acts 1909, ch. 134, sec. 69.

³ Cal., Pen. Code, sec. 421; Ill., Acts 1909, p. 437; Me., Acts 1909, ch. 206, sec. 116; Mich., Acts 1909, No. 194; N.Y., C.L. Ch. 40, secs. 1480, 1481; Wash., Acts 1909, ch. 134, secs. 67, 68.

CHAPTER II

WAGES

SECTION 19. *Definition.* — Wages are, in both common and legal language, the compensation paid or to be paid for services, whether computed by the day, week, or month, or by the piece or job. Payment for piece or job work is frequently spoken of as earnings, but it differs in no sense from payment computed by time, the words “earnings” and “wages” being often used together in statutes on the subject. In mining and elsewhere, much of the work is done by what is called contracting, one man being paid by the ton or other quantity, he paying a helper or helpers a fixed sum daily or at a given rate per unit used; but the sums received by the different workmen are alike wages;¹ so also where a group of men are employed in the joint production of a designated unit, and the payment therefor is divided among them fractionally or by a percentage. The profits of contractors where agreements are made for the performance of work involving individual direction and the employment and guidance of subordinates, as in the erection of a building or the construction of public works, are not classed as wages.² The word “salary” is also said by some courts to be synonymous with wages,³ though in others it is held to mean a larger compensa-

¹ Coal Co. v. Costello, 33 Pa. (9 Casey) 241.

² Heard v. Crum, 73 Miss. 157, 18 So. 934; Lang v. Simmons, 64 Wis. 525, 25 N.W. 650.

³ Bovard v. Ford, 83 Mo. App. 498; Com. v. Butler, 99 Pa. 535.

tion for more important services,¹ or payment for services other than of a manual or mechanical kind.² Salaries of public officers are not exempt from garnishment under laws exempting wages.³

No wages can be recovered for services rendered in violation of the provisions of the law. Thus an engineer working without a license when the law requires one can recover nothing in a suit for wages;⁴ nor can one who works on Sunday where the law prohibits such labor;⁵ or who works more than eight hours in violation of statute.⁶

The payee must in general be either the person rendering the service or his legal representative, though a few states have laws for the payment of wages to the widow, minor children, or other heirs of a deceased employee without the formality of administration, but only in case the debt does not exceed the sum fixed by the statute, this amount varying in different states from seventy-five to two hundred dollars.⁷ Provisions as to the rights of assignees, and other creditors, and of married women and minors are found in the statutes of nearly every state, and will be noted under their various headings. Where wages are paid in violation of the provisions of law applicable in the case, the employer cannot plead such unlawful payment

¹ *Meyers v. City of New York*, 69 Hun 291, 23 N. Y. Supp. 674.

² *In re Stryker*, 158 N.Y. 526, 53 N.E. 525.

³ *McLellan v. Young*, 54 Ga. 399, 21 Am. Rep. 276; *Thomas v. Walnut Land, etc.*, Co. 43 Mo. App. 653.

⁴ *The Pioneer*, Deady 72, Fed. Cas. No. 11,177.

⁵ *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119; *Carson v. Calhoun*, 101 Me. 456, 64 Atl. 838.

⁶ *Short v. Min. Co.*, 20 Utah 20, 57 Pac. 720. (Suit was for pay for overtime, work only.)

⁷ Ala., Code, sec. 4201; Ga., Acts 1901, p. 60; Miss., Code, sec. 2133; Pa., Acts 1907, No. 162.

as a defense in an action to recover wages earned. Thus in the case of a law prohibiting the payment of seamen's wages in advance,¹ payments made in violation thereof were not allowed as a set-off in an action to recover the whole amount of wages earned under the contract.²

SECTION 20. *Rate.* — The rate of wages is usually fixed by agreement, but where no agreement is made, the law implies a promise to pay as much as the services are reasonably worth, or a quantum meruit.³ Where a rate is agreed upon, no action on a quantum meruit can be brought,⁴ and if it can be shown in an action of this sort that a rate was actually agreed upon, that rate will control the decision of the court.⁵ On the other hand, a suit on contract cannot secure a recovery on a quantum meruit.⁶ If the price is agreed upon after entrance on service, the agreed rate relates back to the beginning of such service.⁷ Changing the rate of wages is in effect making a new contract, so that the courts will sanction neither a settlement by proffer of a lower rate than the one agreed upon,⁸ nor a demand for a higher rate on the ground that the work was worth more,⁹ unless mutual consent is properly shown. Thus, though competence is assumed and an employer may rightfully discharge an employee for in-

¹ U.S., 30 Stat. 763.

² *The Alexander M. Lawrence*, 101 Fed. 135.

³ *Henderson Bridge Co. v. McGrath*, 134 U.S. 260, 10 Sup. Ct. 730; *Dubois v. Del. & H. Canal Co.*, 4 Wend. 292 (N.Y.).

⁴ *Clark v. Smith*, 14 Johns. 326 (N.Y.).

⁵ *Rubin v. Cohen*, 113 N.Y. Supp. 843.

⁶ *Birlant v. Cleckley*, 48 S.C. 298, 26 S.E. 600.

⁷ *Royal v. Grant*, 5 Ga. App. 643, 63 S.E. 708.

⁸ *Hackman v. Flory*, 16 Pa. St. 196; *Pennington v. Lumber Co.*, 122 S.W. 923 (Tex. Civ. App).

⁹ *Snyder v. Wright*, 4 E. D. Smith 367 (N.Y.); *Wallace v. Floyd*, 29 Pa. St. 184.

competence, he cannot refuse to pay wages at the agreed rate on the plea that the employee was unskillful, as his retention in service will be construed as a waiver of the employer's right to discharge.¹ Prior notice of reduction of wages may be required by statute,² though in view of the rule of law that an agreed rate controls until a change is assented to by both parties, the importance of such a law does not seem to be great.

Rates of wages have been fixed by statute in a few states though only in the matter of employment on public works,³ or in the printing offices of the state or the United States.⁴ Besides these, a Virginia statute declares that a reasonable sum shall be paid for services in salvage, and in case of the failure of the parties interested to agree, they shall each choose an arbitrator, and a state official shall choose a third, this board to determine the rate.⁵

The state of Massachusetts is the first to look seriously toward the regulation of wages in private undertakings, having provided for a commission to study the matter of the wages of women and minors, with a view to fixing minimum rates of wages for such classes of employees.⁶ Since laws regulating the hours of labor of such persons are valid, there appears to be at least an open field for an attempt to regulate their wages also, though the chief reason for limiting the hours of labor of females, *i.e.*,

¹ Clark v. Fensky, 3 Kans. 389.

² Mo., R. S. sec. 1009; Texas, R. S., sec. 4544; U.S., 30 Stat. 424, sec. 9, C.S., p. 3205 (applies only to receivers of railroads appointed by Federal courts).

³ Cal., Sims' Gen. Laws, No. 2894; Del., Acts 1903, ch. 410 (City of Wilmington only); Nebr., Acts 1903, ch. 17 (cities of first class); Nev., Acts 1907, ch. 202; N.Y., Con. L., ch. 31, sec. 3.

⁴ Cal., Sims' Pol. Code, sec. 531; Kans., Acts 1907, ch. 393; U.S., 28 Stat. 607, 31 Stat. 643.

⁵ Code, sec. 1946.

⁶ Resolve approved May 11, 1911.

on account of physiological differences between males and females, cannot be cited as supporting a wage law.

Laws regulating wages on public works may fix an absolute minimum rate, or they may provide that current or prevailing rates shall be paid. A law of Indiana¹ fixing a minimum rate was held to be unconstitutional, since it interfered with the freedom of counties, cities, and towns, which were held to be corporations with a right to contract in matters affecting their own interests; and also burdened the citizen by taking his property without due process of law.² A similar law of New York³ was upheld in the case of a direct employee of the state under a superintendent of one of its undertakings, the court finding no express or implied restriction in the constitution of the state upon the power of the legislature to fix and declare the compensation to be paid for labor or services performed upon the public works of the state, declaring further that wages so fixed cannot be reduced by the officer under whom any employee might work.⁴ A subsequent law of this state directing contractors as well as public officers to pay current local rates of wages⁵ was declared unconstitutional as exceeding the power of the legislature in the matter of both public and private contracts, the interference with the rights of both the city and the contractor being condemned.⁶ Later this decision was modified to the extent of holding the law applicable to contracts in which the city was directly interested, making the law invalid in its application to contractors only.⁷

¹ Acts 1901, p. 282.

² *Street v. Varney Elec. Supply Co.*, 160 Ind. 338, 66 N.E. 895.

³ Acts 1889, ch. 380.

⁴ *Clark v. State*, 142 N.Y. 101, 36 N.E. 817.

⁵ Acts 1897, ch. 415.

⁶ *People v. Coler*, 166 N.Y. 1, 59 N.E. 716.

⁷ *Ryan v. City of New York*, 177 N.Y. 271, 69 N.E. 599.

Following these decisions came the adoption of an amendment of the constitution of the state, empowering the legislature to regulate the conditions of employment on the public works of the state, whether directed by the state or a subdivision thereof, or by a contractor. The law previously declared unconstitutional was thereupon reenacted,¹ and has been sustained by the court of last resort of the state.² The view of the Supreme Court of the United States, laid down in a case where the question turned, not on rates of wages, but on the hours of labor, holding that municipalities are but the agents, of the state for the conduct of local affairs, and are properly subject to such regulations as the state may see fit to prescribe, would sustain such laws as the above generally.³

SECTION 21. *Deductions from Wages.* — The discounting of time checks by the employer issuing them, or by his agent, may be prohibited by statute,⁴ or the amount that may be deducted for payments made in advance of the regular payday limited.⁵ The willful refusal to pay a wage debt with the intent of obtaining a discount thereon may be punished as a misdemeanor,⁶ or as a crime.⁷

Deductions by way of fines for imperfect work,⁸ or "for any reason,"⁹ may be prohibited or restricted. But a law that prohibits the imposition of a fine or the withholding of wages on account of imperfections, unlawfully interferes with the right to make reasonable contracts;¹⁰ though if it allows for fines only

¹ Const. art. 12, sec. 1, Am. 1905; Acts 1906, ch. 506.

² *People ex rel. Williams Eng. & Cont. Co. v. Metz.*, 193 N.Y. 148, 85 N.E. 1070.

³ *Atkin v. Kansas*, 191 U.S. 207, 24 Sup. Ct. 124.

⁴ Nev., Acts 1905, ch. 106.

⁵ Ark., Dig. sec. 5383.

⁶ Mont., Acts 1907, ch. 144.

⁷ Minn., R.L., sec. 5096.

⁸ Mass., Acts 1909, ch. 514, sec. 114.

⁹ Ind., A.S. sec. 7059b.

¹⁰ *Commonwealth v. Perry*, 155 Mass. 117, 28 N.E. 1126.

in accordance with the terms of a prior agreement or contract, it is valid.¹ Within the purpose of this class of laws are those that prohibit the screening of coal before it is weighed,² the loss of coal through the screen being regarded as causing an unjust loss to the miner whose contract calls for payment by the weight of the coal mined. Such laws have been held to be constitutional, as within the police power of the state,³ though the contrary view has also been expressed, the laws being condemned as interfering unduly with the right to contract freely.⁴

The compulsory remission of any part of an employee's wages for the maintenance of hospitals, libraries, or for other benefits or social purposes is prohibited in some states.⁵ Though it is unlawful for an employer thus to withhold his employee's wages, he is not by that fact relieved from his obligation to supply hospital treatment, according to his contract, to an injured employee whose wages have been thus retained.⁶

SECTION 22. *Time of Payment.* — The time of payment of wages is usually fixed by the contract of employment, or by custom, which is in effect the same thing. An agreement to do a piece of work, or to work for a stated period, for a certain sum, no time of payment being set, is construed to be a contract to pay only when the labor is completed or the contract is otherwise terminated.⁷ If monthly payments are agreed to, wages

¹ *Gallagher v. Mfg. Co.*, 172 Mass. 230, 51 N.E. 1086.

² Ark., Acts 1905, No. 219; Colo., A.S., sec. 3204k; Iowa, Code, sec. 2490, etc.

³ *McLean v. State*, 211 U.S. 535, 29 Sup. Ct. 206; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S.E. 1000.

⁴ *Ramsey v. People*, 142 Ill. 380, 32 N.E. 364; *In re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431.

⁵ Ind., A.S. sec. 2300; Md., P.G.L. art. 23, sec. 297; Mich., C.L. sec. 11400, 11401.

⁶ *Wabash R. Co. v. Kelley*, 153 Ind. 119, 52 N.E. 152.

⁷ *Thompson v. Phelan*, 22 N.H. 339; *Thorp v. White*, 13 Johns. 53 (N.Y.).

are due for full months as they are earned. For fractions of a month no recovery of wages can be had unless there was a wrongful discharge, when the employee may sue, not for wages earned, but for damages caused by the discharge.¹ (See sections 8, 11.)

Numerous statutes have been enacted regulating the time of payment of wages, some legislatures prescribing a monthly payday,² others semi-monthly,³ bi-weekly,⁴ or even weekly⁵ pay-days. These laws may apply to all employers of labor, corporate or individual,⁶ to corporations only,⁷ or to designated classes of employers, as operators of mines,⁸ mines and factories,⁹ or to employers having in their service more than a designated number of laborers.¹⁰

Courts have upheld the constitutionality of a law that applied only to designated classes of employers,¹¹ or to corporations only,¹² as well as a law of general application.¹³ In the New York case cited, though the law uses the words, "each and every employee," it was construed to apply only to manual laborers.

¹ *Walsh v. New York & Ky. Co.*, 85 N.Y. Supp. 83.

² *Ariz.*, Pen. Code, sec. 615; *Va.*, Code, sec. 3657d.

³ *Colo.*, Supp., sec. 2801o1 (except railroads which must pay monthly); *Iowa*, Code, sec. 2490; *Ky.*, Stat., sec. 2739A; *Pa.*, B.P.Dig. p. 2077.

⁴ *Ind.*, A.S. sec. 7065; *Me.*, R.S. ch. 40, sec. 57; *N.J.*, Acts 1899, ch. 38.

⁵ *Conn.*, G.S. sec. 4695; *Kans.*, G.S. sec. 1295 (other than railroad and farming corporations); *Mass.*, Acts 1909, ch. 514, sec. 112.

⁶ *Ariz.*, *Mass.* (practically all but farm labor), *N.J.* (same as *Mass.*).

⁷ *Colo.*, *Conn.*, *Kans.*, *R.I.*

⁸ *Iowa*, *Ky.*, *Wyo.*

⁹ *Ind.*, *Pa.* (by construction), *Va.*

¹⁰ *Me.*, *Ky.*

¹¹ *Hancock v. Yaden*, 121 Ind. 366, 23 N.E. 253; *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091.

¹² *State v. Browne & Sharpe Mfg. Co.*, 18 R.I. 16, 25 Atl. 246; *People v. City of Buffalo*, 57 Hun 577, 11 N. Y. Supp. 314.

¹³ *Com. v. Dunn*, 170 Mass. 140, 49 N.E. 110.

On the other hand, a law requiring a monthly payday was held to restrict the constitutional right of employers and employees to contract freely as to the terms and times of payment;¹ though it was said in a very recent case, in which the constitutionality of a law requiring railroads to pay their employees semi-monthly was under consideration, that the state had an interest in the welfare of its citizens which would be served by the frequent payment of wages so that workmen receiving small wages might be better able to make cash purchases of the necessities of life; and that the workman and a corporate employer do not stand, in the matter of making contracts, on an equal footing, so that the state might properly act in the manner indicated so as to in part remove the existing inequality.² In another state a law requiring weekly payments of the full amount of wages due was held not to be a valid exercise of the police power,³ and obviously a law of like tenor, but applying only to companies, corporations, and associations, and not to individual employers, and also discriminating between manual laborers and other employees, would be found unconstitutional by a court holding such views of the limits of the police power.⁴

Falling within the purpose of the laws of this class to procure prompt payment of wage debts are laws directing that the wages earned by discharged employees shall be paid them at the time of discharge without reference to the date of the customary pay-

¹ *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 304.

² *New York Central, etc., R. Co. v. Williams*, 118 N. Y. Supp. 785, 64 Misc. Rep. 15; affirmed, 199 N.Y. 108, 92 N.E. 404.

³ *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 66 N.E. 1005; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N.E. 62.

⁴ *Toledo, etc., R. Co. v. Long*, 169 Ind. 316, 82 N.E. 757.

day.¹ Some of these laws make the same provision for employees voluntarily leaving service as for those discharged. The act of the Oregon legislature to this effect requires three days' notice of intention to leave, and excepts strikers from the class of employees benefited, unless the regular payday falls more than thirty days after the occurrence of the strike. Laws of this class are constitutional,² at least in their application to corporations, though they may be regarded as infringing on the constitutional rights of persons.³ They do not interfere with the employer's right to claim offsets for damages caused by the employee's failure to fulfill his contract.⁴ A penalty of an added percentage, or of the continuance of wages for a limited time, where the employer fails to comply with the statute, may be provided for;⁵ a penalty may also be allowed for the detention of wages, without regard to the termination of employment;⁶ this provision has been declared valid,⁷ though the contrary has been held on the ground that the law does not protect equally the interests of the employer and the employee.⁸ In order to recover such penalties the employee must comply strictly with any prescribed formalities, as nothing will be taken by way of intendment in the enforcement of penalizing provisions.⁹ In this connection may be mentioned laws that

¹ Ariz., Pen. Code, sec. 616; Ark., Acts 1905, No. 210; Colo., A.S. sec. 2801q1; Oreg., Acts 1907, ch. 163; S. C. Civ. Code, sec. 2718.

² St. Louis, I. M. & S. R. Co. v. Paul, 173 U.S. 404, 15 Sup. Ct. 1042.

³ Leep v. St. Louis, etc., R. Co., 58 Ark. 407, 25 S.W. 75.

⁴ Leep v. St. Louis, etc., R. Co., *supra*.

⁵ Ark., Acts 1905, No. 210; Colo., A.S. sec. 2801q1.

⁶ Ind., A.S. sec. 7068.

⁷ Seeleyville Coal Co. v. McGlosson, 166 Ind. 561, 77 N.E. 1044.

⁸ San Antonio & A. P. R. Co. v. Wilson, 4 Texas App. 565, 19 S.W. 910.

⁹ St. Louis, I. M. & S. R. Co. v. McClerkin, 88 Ark. 277, 114 S.W. 240.

require the payment of interest on any portion of the wages retained as a pledge of continued and satisfactory service,¹ and laws prohibiting entirely such retention.²

SECTION 23. *Place of Payment.* — One state has a law regulating the place of the payment of wages, payment in bar-rooms or other places where liquor is sold being prohibited;³ while another allows a discharged employee of a railroad company to designate any station where a regular agent is kept as the place of payment of the wages due him at the time;⁴ but this matter is generally left to the determination of the parties to the contract.

SECTION 24. *Attachments, Garnishments, etc.* — Demands by an employee's creditors cannot be met by the employer's payment to them of wages earned, unless the employee has made an assignment of his wages in this particular behalf, unwarranted payments by the employer leaving him liable to the employee himself for a second payment of the wages.⁵ Garnishment or other legal proceedings must be resorted to in order to sequester a debtor employee's earnings against his will; and in every state of the Union but North Carolina statutory restrictions exist as to the amounts that can be so taken, and this state has a general exemption provision in its constitution; in many states the restriction applies only where the employee has dependents. These statutes may declare a certain percentage of the debtor's wages exempt, or they may provide that wages for a certain

¹ La., Acts 1908, No. 31.

² Ill., R.S. ch. 48, sec. 16; Conn., G.S. sec. 4696.

³ Cal., Pen. Code, sec. 680.

⁴ Ark., Acts 1905, ch. 210.

⁵ Southern R. Co. v. Fulford, 128 Ga. 103, 54 S.E. 68; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N.E. 83; Crisp v. R. Co., 98 Mich. 651, 57 N.W. 1050; Burns v. Marland Mfg. Co., 80 Mass. 487.

period or of a certain amount cannot be taken for debt. The statute may exempt all wages in the hands of the employer from attachment except for board and lodging for a specified term,¹ or all current wages.²

Wages improperly in the hands of a magistrate through garnishment may be recovered by a rule against him.³ An employer cannot allow wages to accumulate in his hands until the total exceeds the exempted amount and thus defeat the provisions of the law,⁴ nor can an employee make a valid contract waiving his exemption rights.⁵ The law exempting wages is held to protect from attachment also any property purchased by the use of the exempted wages.⁶ Courts differ on the question as to whether or not the protection afforded by exemption laws extends to non-residents.⁷ The matter may be determined by statute, as, for instance, a declaration that the law of the state of residence shall control.⁸ Assigning claims to non-residents or otherwise taking or sending them out of the state for collection in order to avoid local exemption laws is prohibited by the statutes of a number of states, and a law of this sort was held to support a request for an injunction against a creditor prosecuting his suit outside the state against a garnishee for the recovery of a debt that was exempt under the law of the state of residence of both

¹ Pa., B. P. Dig. p. 2077, secs. 25, 26; Acts 1905, No. 99.

² Texas, R.S. secs. 2395, 2397.

³ *Curran v. Fleming*, 76 Ga. 98.

⁴ *Chapman v. Berry*, 73 Miss. 437, 18 So. 918.

⁵ *Richardson v. Kaufman*, 143 Ala. 243, 39 So. 368; *Green v. Watson*, 75 Ga. 471.

⁶ *Aultman & Taylor Co. v. Smith*, 119 S.W. 1178 (Ky.).

⁷ Cf. *Wright v. R. Co.*, 19 Nebr. 175, 27 N.W. 90, and *Lyon v. Callopy*, 87 Iowa 567, 54 N.W. 476.

⁸ S. Dak., Justices' Code, sec. 41.

debtor and creditor.¹ The debtor was also held to be entitled to a judgment in damages against the creditor for the amount of wages collected by him in violation of the law. In another case such a law was held to be unconstitutional on the ground that it discriminated between wage earners and other debtors, and between creditors residing within the state and those residing outside, placing the former at a disadvantage; also as extending the exemption laws of a state beyond its boundaries.² The weight of opinion seems to be, however, that such laws are constitutional,³ and that where the law prohibits sending claims out of the state, taking them is a violation of the law.⁴ The garnishee's action may be in good faith in making payments that could have been defended if there had been a full knowledge of the circumstances, in which case the debt will be regarded as discharged in so far as he is concerned, the liability falling upon the wrongful garnishor;⁵ but where payment is not made, it may still be held that the foreign judgment is within the jurisdiction of the court rendering it, but the payment thereon will be subject to the exemption laws of the state of residence of the debtor.⁶

SECTION 25. *Assignments of Wages.* — Assignments of unearned wages are safeguarded in various ways, as by the requirement that they must be recorded,⁷ that copies must be filed with

¹ *Main v. Field*, 13 Ind. App. 401, 40 N.E. 1103; *Wilson v. Josephs*, 107 Ind. 490, 8 N.E. 616.

² *In re Flukes*, 157 Mo. 125, 57 S.W. 545.

³ *Sweeny v. Hunter*, 145 Pa. St. 363, 22 Atl. 653; *Singer Mfg. Co. v. Fleming*, 39 Nebr. 679, 58 N.W. 226.

⁴ *Wilson v. Josephs*, *supra*.

⁵ *Main v. Field*, *supra*; *O'Connor v. Walter*, 37 Nebr. 267, 55 N.W. 867.

⁶ *Singer Mfg. Co. v. Fleming*, *supra*.

⁷ Conn., Acts 1905, ch. 78; Ill., R.S. ch. 10b, sec. 18, etc.

the employer,¹ or even that his consent must be obtained,² or that the wife must join in the husband's assignments, or *vice versa*.³ Assignments to secure loans⁴ or future advances⁵ may be declared void, or all assignments of future earnings prohibited.⁶ This latter prohibition was declared constitutional in a case in which it was said that the law was enacted for the protection of a class of persons who are in large numbers dependent on daily or weekly wages for the maintenance of themselves and families, and whose circumstances render them peculiarly liable to imposition and injustice. The law was approved on this ground, and as aiming clearly at the "protection of wage earners from oppression, extortion, or fraud on the part of others, and from the consequences of their own weakness, folly, or improvidence."⁷

The language of the court in this case can hardly commend itself to general acceptance, for while laws of the same general class are sustained by the highest courts, the reasons usually offered do not convey the impression of restraint on the acts of the employee on account of his incapacities of the sort designated. Indeed, the court of one state declared a law prohibiting the payment of wages in scrip, even at the employee's option, was "an encroachment upon his constitutional rights, and an obstruction to his pursuit of happiness. Such laws as the one under consideration classify him among the incompetents, and degrade his calling."⁸ The constitutionality of the law of

¹ Mass., Acts 1906, ch. 390; N.Y., Acts 1904, ch. 77.

² La., Acts 1906, No. 5; Minn., Acts 1905, ch. 309; Mass., Acts 1908, ch. 605.

³ Colo., Acts 1907, ch. 240; Iowa, Acts 1906, ch. 148; Mass., Acts 1908, *supra*.

⁴ Ga., Acts 1904, p. 84.

⁵ Mass., Acts 1906, ch. 390.

⁶ Ind. A.S., sec. 7059c.

⁷ Int. Textbook Co. v. Weissinger, 160 Ind. 349, 65 N.E. 521.

⁸ State v. Haun, 61 Kans. 146, 59 Pac. 340.

Massachusetts requiring the recording of assignments and their prior acceptance by the employer, as well as the joint action of the wife, was upheld by the supreme court of that state on the grounds that it lessened the opportunity for dishonesty on the part of both wage earners and money lenders, as well as tending to diminish the risk of litigation consequent on the refusal of an employer to pay the assigned wages. It also admitted the validity of a distinction between assignments to secure loans of money and assignments as security for necessities. The section relating to the wife's joint action was held to be of less certain validity, but was supported as within the power of the legislature, which "might look chiefly to the ordinary relations between husband and wife under the law, and adopt this form of regulation as salutary in its application to most members of the class with which they were dealing."¹

The business of dealing in assigned wages may be regulated by prohibiting discounts in excess of the legal rate of interest;² or dealers may be required to procure a license, the rate of interest and other charges be limited, all calculations required to be based on the amount actually advanced by the broker, or other restrictions made.³ An ordinance embodying a number of these regulations was declared constitutional as tending to prevent fraud and extortion;⁴ so of a law of Connecticut limiting the rate of interest;⁵ while in Texas a statute taxing dealers in assigned wages⁶ was declared unconstitutional as restraining

¹ *Mutual Loan Co. v. Martell*, 200 Mass. 482, 86 N.E. 916.

² N.J., G.S., p. 2344; Md., Acts of 1906, ch. 399.

³ Colo., Acts 1909, ch. 17; Del., Acts 1909, ch. 233; Ind., Acts 1909, ch. 34, etc.

⁴ *Sanning v. City of Cincinnati*, 81 Ohio St. 142, 90 N.E. 125.

⁵ *State v. Hurlburt*, 82 Conn. 232, 72 Atl. 1079.

⁶ Acts 1905, ch. 111.

freedom of trade and denying equality before the law;¹ and an Illinois statute applying to salaries as well as wages, and declaring the forfeiture of the principal where the interest is usurious,² was for these reasons declared void,³ restrictions on salaried employees not being justified, and other usurious contracts not being dealt with in so drastic a manner.

SECTION 26. *Suits for Wages.* — Suits for wages are specially provided for in a number of states, as by allowing a successful claimant an additional recovery for attorneys' fees;⁴ by prohibiting a stay of execution where the judgment is for the recovery of a wage debt;⁵ by providing that no property shall be exempt from execution on such a judgment;⁶ by placing suits for wages for manual labor at the head of the trial docket;⁷ by providing that two or more wage claimants may make joint appeals;⁸ or by prohibiting the allowance of setoffs in suits for wages except for money actually loaned or advanced,⁹ or unless specifically provided for in writing.¹⁰

Courts differ as to the constitutionality of laws allowing a successful claimant in a suit for wages to recover also an attorney's fee, some holding such laws constitutional,¹¹ while others

¹ *Owens v. State*, 53 Tex. Cr. App. 105, 112 S.W. 1075.

² Act of May 13, 1905.

³ *Massie v. Cessna*, 239 Ill. 352, 88 N.E. 152.

⁴ Cal., Acts 1907, ch. 51; Idaho, Code, sec. 3721; Ill., R.S. ch. 13, sec. 13; Ind., A.S. sec. 7068.

⁵ Iowa, Code, sec. 3996; Mich., C.L. sec. 901; N. Dak., Code, sec. 8447; Ohio, Gen. Code, sec. 10,403.

⁶ Ill., R.S., ch. 52, sec. 16; Minn., Const., art. 1, sec. 12; N.C., Rev. 1905, sec. 685; Va., Code, sec. 3630.

⁷ Pa., B. P. Dig., p. 2073, sec. 3.

⁸ Pa., B. Dig., p. 246, sec. 54.

⁹ Wyo., R.S., sec. 2592.

¹⁰ Ala., Code, sec. 5858; Wyo., R.S., sec. 2593.

¹¹ *Vogel v. Pekoc*, 157 Ill. 339, 42 N.E. 386; *Secleyville Coal Co. v. McGlosson*, 166 Ind. 561, 77 N.E. 1044; *Schmoll v. Lucht*, 106 Minn. 188, 118 N.W. 555; *Singer Mfg. Co. v. Fleming*, 39 Nebr. 679, 58 N.W. 226 (holding that the giving of an attorney's fee is only compensatory, not penal).

condemn them as giving an unequal advantage to one class of suitors¹ or to a plaintiff over the defendant.² The statute of Colorado on this subject avoids the latter difficulty by allowing an attorney's fee to be recovered by the successful party.³

SECTION 27. *Mechanics' Liens.* — The common law gave a lien on personal property benefited by the labor or care of a person to whom it had been intrusted, for the protection of the workman's interests.⁴ This right has been extended by statute to the protection of laborers and mechanics generally, for practically every sort of labor, affecting real as well as personal property, and laws to this effect are to be found on the statute books of every state and territory.⁵

In order to secure the benefits of the statutory lien, the provisions of the law need be only substantially complied with, as such laws are to be liberally construed,⁶ and where the compliance suffices to make the facts certain, errors or superfluities will not invalidate the lien.⁷ The difficulty of enforcing a lien on certain classes of property, and the desire to reach the party properly chargeable have combined to lead to the enactment of

¹ *Manowsky v. Stephan*, 233 Ill. 409, 84 N.E. 365 (statute included all lien claimants); *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 304; *Atkinson v. Woodmansee*, 68 Kans. 71, 74 Pac. 640.

² *Gulf, etc., R. Co. v. Ellis*, 165 U.S. 150, 17 Sup. Ct. 255; *Davidson v. Jennings*, 27 Colo. 187, 60 Pac. 354; *Randolph v. Supply Co.*, 106 Ala. 501, 17 So. 721.

³ Supp. sec. 2801ul.

⁴ *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Morgan v. Congdon*, 4 N.Y. 552.

⁵ The law of the District of Columbia, 31 U.S. Stat. 1384, is a fair type of laws of this class.

⁶ *Mining Co. v. Cullins*, 104 U.S. 176; *Hays v. Mercier*, 22 Nebr. 656, 35 N.W. 894; *Traction Co. v. Brennan* 87 N.E. 215 (Ind.). *Per contra*, *National Fire Proofing Co. v. Huntington*, 81 Conn. 632, 71 Atl. 911.

⁷ *Hurley v. Tucker*, 112 N. Y. Supp. 980.

special provisions of law where the work is being done by contractors on property of the sort indicated. Instead of making the thing worked on the subject of the lien, the fund from which a contractor on public works is to be paid is subjected to a lien on due notice to proper authorities, in a few states.¹ The same rule may be applied to railroad construction and repair.² The law may also put upon the principal the duty of withholding payments from the contractor when notified of a laborer's claim thereon, to await an adjustment of claims.³

SECTION 28. *Bonds to Secure Payment of Wages.* — Still another form of protection which applies most frequently to labor on public works,⁴ though in a few states to railroad work,⁵ and in New York to canal construction,⁶ is one that requires contractors, prior to the commencement of their work, to give bond for the payment of such claims as would, under other conditions, give rise to liens. Such laws exist in a score of jurisdictions, Congress having enacted one applicable to public works of the United States.⁷ This care for the safeguarding of the wages of employees of contractors is further expressed by laws compelling contracting stevedores to be licensed by public authority, and to give bond;⁸ by requiring the recording and publication of the contract or other conditions under which certain undertakings

¹ Colo. Supp., secs. 2888-2891; Ind., Acts 1905, ch. 124, sec. 9; N.Y., Con. L., ch. 33, secs. 5, 12.

² Mich., C. L., secs. 5243-5245; Mo., R. S., sec. 1057

³ Miss., Code, sec. 3074; Ohio, Gen. Code, sec. 8325.

⁴ Ind., A.S. secs. 4300b, 4300c, 5592, 5593; Mich., Acts 1905, No. 187; Wash., Code, secs. 5925-5927.

⁵ Conn., G.S. sec. 3696; Me., R.S. ch. 51, sec. 47; Minn., R.L., secs. 2919, 2920.

⁶ Con. L., ch. 5, sec. 145.

⁷ 28 Stat. 278; 33 Stat. 811.

⁸ Md., Acts 1898, ch. 505; N.C., Rev. 1905, sec. 2050.

are carried on ;¹ or by making the failure of a contractor to pay wages due out of current receipts under the contract a misdemeanor,² or a felony,³ though this latter law applies only to labor on public works. Laws of this class come within the reason of lien laws, and have generally received a liberal construction, with a view to effectuating their purpose to require payment for labor and materials from those who profit by their use.⁴

SECTION 29. *Liability of Stockholders of Corporations.* — The earnings of employees of corporations are protected in several states by statutes that make individual stockholders, either in designated classes of corporations,⁵ or in business corporations generally,⁶ liable for wage debts due employees.

SECTION 30. *Preference of Wage Claims.* — Of almost equal universality with the lien laws are laws making wages preferred claims in the settlement of the estates of deceased employers and in cases of bankruptcy, assignments, executions, etc.⁷ Such laws are constitutional,⁸ and apply to all wages due at the time, whether the claimant has left service or not.⁹ They are variously interpreted, some courts holding that they should be strictly construed, and that they are for the benefit of manual

¹ Idaho, Code, sec. 638.

² S.C., Cr. Code, sec. 338.

³ Cal., Pen. Code, sec. 653d.

⁴ Hill v. American Surety Co., 200 U.S. 197, 26 Sup. Ct. 168.

⁵ Ind., A.S. secs. 5077, 5198, etc.; N.J., G.S., pp. 1610, 2319; N.C., Rev. 1905, sec. 2556.

⁶ Mass., Acts 1903, ch. 437, sec. 33; Mich., Const., art. 15, sec. 7; Pa., B.P. Dig., p. 423.

⁷ Mass., R.S., ch. 142, sec. 1; ch. 163, sec. 118; N.Y., Con. L., ch. 12, sec. 27; ch. 31, sec. 9; U.S., 30 Stat. 563, Comp. St., p. 3447, sec. 64, etc.

⁸ Richardson v. Thurber, 104 N.Y. 606; Small v. Hammes, 156 Ind. 556, 60 N.E. 342.

⁹ In re Scott, 148 N.Y. 558, 42 N.E. 1079.

laborers only;¹ while others rule that they should receive a "fair and liberal construction,"² and that they are applicable in the case of a superintendent of laborers,³ or of bookkeepers and salesmen, under a law using the term "employees."⁴ Such a law cannot be availed of by an official of a corporation advancing wages due its employees;⁵ nor, it has been held, by an assignee of a wage debt,⁶ though the contrary has been held,⁷ and it is not clear why the rule in this case should differ from that in others involving like conditions.⁸ The claim given has been held not to amount to a lien,⁹ though here again other courts have viewed the law differently;¹⁰ and it seems a wise provision of statute to declare the status of such a claim.¹¹ Where the view is held that the claim does not rank with a lien, it will follow that perfected lien claims take precedence over wage claims of other forms;¹² though a prior mortgage ranks below the claim given by such a statute,¹³ and to hold otherwise would give a lender gratuitously the benefit of the labor which goes into the property and gives it its existence and value.

SECTION 31. *Payment of Wages in Scrip, etc.* — Many states

¹ *People v. Remington*, 45 Hun 329 (N.Y.); *Raynes v. Kokomo Ladder, etc. Co.*, 153 Ind. 315, 54 N.E. 1061; *Johnston v. Barrills*, 27 Ore. 256, 41 Pac. 656.

² *Bass v. Doermann*, 112 Ind. 390, 15 N.E. 377.

³ *Pendergast v. Yanders*, 124 Ind. 159, 24 N.E. 724.

⁴ *Palmer v. Van Santvoord*, 153 N.Y. 612, 47 N.E. 915.

⁵ *Suddath v. Gallaher*, 126 Mo. 393, 28 S.W. 880.

⁶ *People v. Remington, supra*.

⁷ *Falconio v. Larsen*, 31 Oreg. 137, 48 Pac. 703; *Union Trust Co. v. Southern Sawmills & Lumber Co.*, 166 Fed. 193. ⁸ *White v. Stanley*, 29 Ohio St. 423.

⁹ *Winrod v. Walters*, 141 Cal. 399, 74 Pac. 1037.

¹⁰ *Coe v. R. Co.*, 4 Stew. (31 N.J. Eq.) 129; *In re Slomka*, 117 Fed. 688.

¹¹ N.J., Acts 1896, ch. 185, sec. 83. (Declares claim a lien.)

¹² *In re Kirby-Dennis Co.*, 95 Fed. 116 (C.C.A.).

¹³ *Bell v. Hiner*, 16 Ind. App. 184, 44 N.E. 576; *Litzenberg v. Trust Co.*, 8 Utah 15, 28 Pac. 871; *Reynolds v. Black*, 91 Iowa 1, 58 N.W. 922.

have laws regulating the payment of wages with respect to the medium of payment. Payment in scrip, tokens, store orders, or non-negotiable paper is in general prohibited by the laws of this class.¹ These laws take a variety of forms, and have been the subject of much litigation in disputes as to their constitutionality, and on this point the courts do not agree. It has been held that it was a violation of such a law to issue by agreement an order for merchandise;² and that an employee accepting scrip issued in violation of the law had no right of action to recover its face value, and could convey none to an assignee.³ The laborer did not forfeit his right to wages, however, by the acceptance of the checks, though they were of no value to him even as evidence; but he might sue, as might his assignor in a proper case, in an action for work and labor performed, and recover a quantum meruit.⁴ A statute requiring all wage earners to be paid in lawful money has been held not to be violated by the issue between paydays of checks for merchandise at the company's store, monthly balances being paid in cash, but no unused checks being redeemed;⁵ and a law prohibiting the issue of non-transferable scrip, and requiring the redemption of all scrip at its "face value" in the hands of the holder, was said not to authorize an assignee of scrip payable in merchandise to demand payment in money.⁶ A law that is unique in the method proposed for discouraging the use of scrip is one that levies a tax of twenty-five

¹ Ill., R.S., ch. 98, sec. 18; Ga., Civ. Code, sec. 1871; Ind., A.S., sec. 7060; Acts 1903, ch. 171; N.J., G.S., p. 2343; N.Y., Con. L., ch. 31, sec. 10.

² *Cumberland Glass Mfg. Co. v. State*, 58 N.J.L. 224, 33 Atl. 210.

³ *Naglebaugh v. Mining Co.*, 21 Ind. App. 551, 51 N.E. 427.

⁴ *Naglebaugh v. Mining Co.*, *supra*.

⁵ *Avent Beattyville Coal Co. v. Com.*, 96 Ky. 218, 28 S.W. 502.

⁶ *Marriner v. Roper Co.*, 112 N.C. 164, 16 S.E. 906.

per cent on all scrip, coupons, or orders issued in payment for wages and not redeemed in money within thirty days after the date of such issue.¹ Laws that prohibit the payment of wages in merchandise, orders, etc., are obvious and direct interferences with the freedom of contract, but a law to this effect was enforced in New Jersey.² A law requiring employers to redeem in cash at their face value all coupons, scrip, or orders issued by them in payment of wages has been held constitutional,³ and is equally binding on foreign corporations as on those formed within the state;⁴ but a penal provision authorizing imprisonment for failure to redeem is unconstitutional, as such action would amount to imprisonment for debt.⁵ An assignee's rights are the same as those of the original holder, and no inquiry can be raised as to the amount actually paid by the assignee for his claim.⁶

On the other hand is the ruling that a provision that wages may be paid only in lawful money interferes with the right of contract, and is void;⁷ so of a law that prohibits the issue of orders, etc., unless negotiable and redeemable at their face value in lawful money.⁸ Laws applying only to mining and

¹ Pa., B. Dig. p. 874.

² *Cumberland Glass Mfg. Co. v. State*, 58 N.J.L. 224, 33 Atl. 210.

³ *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 22 Sup. Ct. 1; *Johnson, Lytle & Co. v. Spartan Mills*, 68 S.C. 339, 47 S.E. 695; *Union Sawmill Co. v. Felsenthal*, 84 Ark. 494, 108 S.W. 217; *Shortall v. Bridge, etc., Co.*, 45 Wash. 290, 88 Pac. 212; *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S.E. 1000.

⁴ *Dayton Coal & I. Co. v. Barton*, 183 U.S. 23, 22 Sup. Ct. 5.

⁵ *State v. Paint Rock Coal & Coke Co.*, 8 Pickle (Tenn.) 81, 20 S.W. 499.

⁶ *Harbison v. Iron Co.*, 103 Tenn. 421, 53 S.W. 955.

⁷ *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *Jordan v. State*, 51 Tex. Cr. App. 531, 103 S.W. 633; *Kelleyville Coal Co. v. Harrier*, 207 Ill. 624, 69 N.E. 927.

⁸ *State v. Missouri Tie, etc., Co.*, 181 Mo. 536, 80 S.W. 933.

manufacturing companies have been declared unconstitutional, as special and discriminatory;¹ so of one exempting farm labor from its provisions,² or one applicable to corporations only.³

¹ *State v. Goodwill*, 33 W. Va. 179, 10 S.E. 285; *State v. Loomis*, 115 Mo. 307, 22 S.W. 350; *Dixon v. Poe*, 159 Ind. 492, 65 N.E. 518.

² *Kelleyville Coal Co. v. Harrier*, *supra*.

³ *State v. Haun*, 61 Kans. 146, 59 Pac. 340. It is perhaps of sufficient importance to notice here the status of corporations in respect of restrictive legislation of the sort under discussion, inasmuch as diametrically opposite views seem to be entertained by the courts of different states. Thus in the *Haun* case, corporations are said to be persons within the guarantee of the fourteenth amendment as to the equal rights of persons (citing *Santa Clara Co. v. Southern P. R. Co.*, 118 U.S. 394, 6 Sup. Ct. 1132; *Pembina Min., etc., Co. v. Pennsylvania*, 125 U.S. 181, 8 Sup. Ct. 737) and entitled to protection against unfair discrimination as are other persons. Other courts have declared a law unconstitutional that discriminated against corporations as compared with other employers (*Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 304; *Toledo, etc., R. Co. v. Long*, 169 Ind. 316, 82 N.E. 757; *O'Connell v. Lumber Co.*, 113 Mich. 124, 71 N.W. 449; *Harbison v. Iron Co.*, 103 Tenn. 421, 53 S.W. 955; *Santa Clara Co. v. Southern P. R. Co.*, *supra*); while the supreme court of Arkansas held that while the law governing the payment of wages to discharged employees might be invalid as to individual employers, it was nevertheless valid as to corporations (*Leep v. R. Co.*, 58 Ark. 507, 25 S.W. 75); and on the point being submitted by the legislature to the supreme court of Rhode Island, a law limiting the hours of labor of employees on street railways was declared valid, one of the reasons assigned being that the law applied to corporations. (*Ten Hour Law*, 24 R.I. 603, 54 Atl. 602.)

It should be observed that the doctrine applied by the courts of Arkansas and Rhode Island, which was also approved by the Supreme Court of the United States (*St. Louis, I. M. & S. R. Co. v. Paul*, 173 U.S. 404, 19 Sup. Ct. 419; *Hammond Packing Co. v. State*, 212 U.S. 322, 29 Sup. Ct. 370) was expressly based on the reserved power of the state to amend the charters of corporations, which are the creatures of the state. This view was taken, and for the reason assigned, in cases in which laws requiring railroad and other corporations to pay their employees weekly were upheld. (*Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091; *State v. Brown & Sharpe Mfg. Co.*, 18 R.I. 16, 25 Atl. 246); so that the real difference would appear to be in the express provisions of the constitutions of the various states as to reserved powers over corporate bodies, or in the views taken by the courts as to the fair and just implication of such resident power apart from explicit statements. There is no reasonable question that corpora-

In the last named case it was also held that a provision exempting corporations employing fewer than ten men was discriminatory and would of itself invalidate the law.¹

A case in which the law was declared valid, but was, by construction, apparently largely deprived of its intended force, was one in which the statute requiring certain corporations to pay their employees only in cash was held not to prevent employees from drawing orders on their employers in favor of merchants from whom they had purchased goods, the amounts of such orders to be deducted from the wages due the employees drawing the same.² The effect and practical working of such a

tions are persons in the eye of the law, with such capacities as the law creating them bestows. The view would not seem to be an unreasonable one, however, that was taken in a recent case, that the nature of a corporation as a creature of law, — a person only by a sort of legal fiction, — and incapable of subjection to certain penalties, as imprisonments, warrants different forms of punishment in case of violations of the law than are provided against individuals guilty of like offenses (*State v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902); and if discriminations of this sort are thus justifiable, it is not difficult to realize that a like course of reasoning will lead to corresponding rulings where other phases of corporate and individual rights and remedies are the subject of consideration, the wider scope of the power which the state possesses over corporations and joint stock associations in and of itself affording a ground for distinctions between them and individuals. (*Hammond Packing Co. v. State*, *supra*.)

Certain distinctions hold between corporations and individuals because of the fact that although persons, and thus entitled to an equality of protection and the right not to be deprived of their property without due process of law, under the provisions of the fourteenth amendment, corporations are not citizens, entitled to all the privileges and immunities of citizens in the several states, under the provisions of Article 4, section 2, clause 1, of the Constitution, or of the fourteenth amendment thereto; since the term, "citizens" "applies only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature, and possessing only such attributes as the legislature has prescribed." (*Pembina Min. Co. v. Pennsylvania*, *supra*; *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 19 Sup. Ct. 281.)

¹ See also *Union Sawmill Co. v. Felsenthal*, *supra*.

² *Shaffer v. Union Min. Co.*, 55 Md. 74.

method would differ in no respect from the issue of orders by the employer, to be presented by the workman in payment for goods to be purchased.

Diverse rulings are found as to the status of the tokens in common use where payments in other than lawful money are allowed. Thus it is said that they possess none of the essential qualities of a negotiable instrument payable to the bearer, and that mere possession raises no presumption as to rights;¹ while on the other hand they have been held to be promises in writing to pay, and the party issuing them was not allowed to be heard to oppose the legal presumption that they were based on a valuable consideration,² a conclusion that appears to be well founded as against a corporation issuing tokens stamped with a mark apparently intended to indicate value, and issued by it in adjustment of its affairs with others.

SECTION 32. *Company Stores.* — Within the meaning of the laws regulating the medium of payment of wages, and subject to the same rules of construction, are laws regulating the operation of what are known as company stores. Such stores may be prohibited,³ or they may merely be forbidden to charge any higher price for goods sold to employees than that charged for goods sold to other customers for cash.⁴ Some of these laws relate only to designated classes of employers, and would seem to fall under the strictures of the fourteenth amendment of the Federal Constitution as to uniformity and equality of legislation; and such has been the view taken by some of the state courts

¹ *Attoyae River Lumber Co. v. Payne*, 122 S.W. 278. (Tex. Civ. App.)

² *Kentucky Coal Mining Co. v. Mattingly*, 133 Ky. 526, 118 S.W. 350.

³ Colo., Supp., sec. 2801f1; Pa., B. P. Dig., p. 1385.

⁴ Ind., A.S., sec. 7061; Ohio, Gen. Code, sec. 12945; Va., Code, sec. 3657d.

of last resort.¹ In the West Virginia case cited, the court also denounced the law as an "insulting attempt to put the laborer under legislative tutelage."

SECTION 33. *Freedom of Employees as Traders, etc.* — Laws directed to the subject of freedom in the choice of stores or places for trading come within the same class of laws with the above, and are found in connection therewith, their intention being, as set forth in the opinion in a case involving the constitutionality of the statute,² to correct the abuse practiced on workmen "by forcing them, directly or indirectly, into dealing with the 'company stores,' where goods at exorbitant prices were paid for wages instead of money." In this case a statute was upheld that is restricted in its application to mines operating with ten or more employees,³ the court holding that the statute was authorized by the state constitution, which requires the payment of wages in lawful money; and that the discrimination as to mines employing ten or more persons was not offensive, since in cases where a smaller number was employed, the evil aimed at could hardly be practiced. Laws of this description are found in a number of states,⁴ while in a few, restrictions in the choice of boarding houses are similarly forbidden.⁵ The constitutionality of this class of laws is generally sustained,⁶ though apart from

¹ *Frorer v. People*, 141 Ill. 171, 31 N.E. 395; *Luman v. Hitchens Bros. Coal Co.*, 90 Md. 14, 44 Atl. 1051; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 10 S.E. 288.

² *Commonwealth v. Hillside Coal Co.*, 22 Ky. L. R. 559, 58 S.W. 441.

³ Ky., Stat., sec. 2739A.

⁴ Colo., Supp., sec. 2801f1; Ind., A.S., sec. 7073; Ohio, Gen. Code, sec. 12944; Wash., C. & S., sec. 3306, etc.

⁵ Mont., Acts 1903, ch. 102; Nev., Acts 1903, ch. 124; Oreg., Acts 1907, ch. 192; Utah, C.L., sec. 4487x25.

⁶ *Shortall v. Bridge, etc., Co.*, 45 Wash. 290, 88 Pac. 212; *Peel Splint Coal Co. v. State*, 36 W. Va. 802, 15 S.E. 1000.

legislation to the contrary, it has been held that an employer may lawfully require his employees to refrain from trading or otherwise dealing with a designated person, on the ground that he has the right to make the terms of his contract such as he chooses, if not illegal, and, if accepted by the employee, they are binding upon him, and a third person has no right to interfere therewith.¹ This accords with the principle laid down in a leading case² that an employee is free to work or refuse to work, at his option, the right of making terms resting with the contracting parties, who may refuse as between themselves to deal with any designated person or persons, or may accept such a condition laid down by either party. This is clearly the recognized principle of freedom of contract, and where lawfully exercised the question of motive cannot be raised, since malice cannot make that illegal which is in itself legal.³ While the enforcement of such a restriction by an employer does not involve the element of conspiracy, its likeness to the boycott, as usually enforced by the mutual agreement of several, has been pointed out; and it is likewise clear that if employers may so dictate as to trade, etc., the employee may reciprocally dictate as to employment, so that the closed shop, so-called, comes within the same principle. The statutes above cited relate to the employees' rights only, and do not assume to confer upon any merchant or other person injured by a violation thereof the right to sue for damages occasioned by a violation. Apart from statute, however, it has been held that an employer is liable for damages to an injured

¹ *Heywood v. Tillson*, 75 Me. 225; *Payne v. Western, etc., R. Co.*, 81 Tenn. 507, 49 Am. Rep. 666. (See strong dissenting opinion in this case.)

² *Com. v. Hunt*, 4 Metc. 133 (Mass.). See also *Carew v. Rutherford*, 106 Mass. 14, 8 Am. Rep. 287.

³ *Jenkins v. Fowler*, 24 Penn. 308.

third party when as a mere matter of personal preference, or the expression of a spirit of malice or revenge, and not from the actual interests of his business, he undertakes to require his employees not to patronize certain merchants or hotel keepers.¹ This view is directly opposed to that held in the Heywood and Payne cases cited above; and while it may not accord with the abstract legal principle of freedom of contract, the economic fact that operates in determining the action of legislatures in the enactment of laws undertaking to place the employee on a footing by statute that he is unable to secure unaided, would seem to favor the prohibition of such restrictive contracts as seek to control the liberty of the employee in the spending of his earnings, since to permit the contrary offers too great opportunity for oppression and extortion of the employee himself, regardless of the effect on third persons.

Freedom in the selection of the family physician is protected by a statute of Tennessee,² which also prohibits the retention of any part of an employee's wages, without his full consent, for the avowed purpose of paying the salary of a company doctor; while another state forbids employers to require the taking out of accident insurance with any specified company.³ This statute was not intended, however, to interfere with the organization of relief funds which employees may voluntarily join, and for which the employer may withhold the agreed contribution of the employee from his wages.

¹ *Railway Co. v. Greenwood*, 2 Texas Civ. App. 76, 21 S.W. 559; *Hanchett v. Chiatovich*, 101 Fed. 742 (C.C.A.). See also dissenting opinion in the Payne case, *supra*.

² Code, secs. 6879, 6880.

³ Mich., C.L., secs. 8584-8586.

CHAPTER III

HOURS OF LABOR

SECTION 34. *Regulation of Hours of Labor.* — The common law attempted no definition of the length of a day's labor, that being a matter to be determined either by the parties to the contract of hiring or by the custom of the trade or locality. Courts will, however, look into the facts in any given case to determine what was reasonable in the circumstances.¹ Pay for overtime is not favored, in the absence of particular stipulations, as services rendered under a contract are supposed to be covered thereby.² So if some time is lost by the workman, and the employer permits it without remonstrance, he cannot afterwards withhold payment.³

Unless the nature of the employment or an express contract forbids, the employee's time outside of his hours of service may be occupied in work for others if such work is not incompatible with his duty to his employer.⁴ But engaging in work that leads to a conflict of interests will not be sanctioned.⁵ This does not prevent an employee from perfecting patents and re-

¹ *Luske v. Hotchkiss*, 37 Conn. 219, 9 Am. Rep. 314.

² *Guthrie v. Merrill*, 4 Kans. 187; *U.S. v. Martin*, 94 U.S. 400; *Fitzgerald v. Paper Co.*, 96 Me. 220, 52 Atl. 655.

³ *Willey v. Warden*, 27 Vt. 655.

⁴ *Stone v. Bancroft*, 139 Cal. 78, 70 Pac. 1017; *Hillsboro Nat. Bank v. Hyde*, 7 N. Dak. 400, 75 N.W. 781.

⁵ *Storey v. Transportation Co.*, 17 Hun 579 (N.Y.).

taining the right thereto;¹ though an enforceable agreement may be made by an employee to assign an interest in all patents secured by him,² or the entire title may be secured to the employer by a suitable contract.³ Where the employee uses the property or labor of his employer to perfect an invention, and assents to the use of it by his employer, he cannot by afterward obtaining a patent compel the employer to pay a royalty, but will be presumed to have given him a license to use the invention.⁴

Statutory regulation of the working time has been undertaken in a number of states, and for employees engaged in interstate commerce by the United States.⁵ The state laws are sometimes general in effect, fixing the number of hours that constitute a day's labor generally,⁶ domestic and farm labor being commonly excepted; or they may fix the hours of labor in designated employments, as in smelters, underground mines, etc.,⁷ where work is done in compressed air,⁸ on railroads,⁹ street railways,¹⁰ in drugstores,¹¹ bakeries,¹² and brickyards.¹³ The hours of labor on public works are limited in a number of

¹ *Solomons v. U.S.*, 137 U.S. 342, 11 Sup. Ct. 88; *Joliet Mfg. Co. v. Dice*, 105 Ill. 649.

² *Wright v. Vocalion Organ Co.*, 148 Fed. 209, 78 C.C.A. 183.

³ *Hulse v. Bonsack Mach. Co.*, 65 Fed. 864, 13 C.C.A. 180.

⁴ *Gill v. United States*, 160 U.S. 426, 16 Sup. Ct. 322; *McClurg v. Kingsland*, 42 U.S. 187 (1 Howard 202).

⁵ Act of March 4, 1907, 34 Stat. 1415.

⁶ Ind., A.S., sec. 7052; Minn., R.L., sec. 1798; N.Y., Con. L., ch. 31, sec. 3, etc.

⁷ Colo., Acts 1905, ch. 119; Mo., Acts 1905, p. 236; Utah, C.L., sec. 1537, etc.

⁸ N.Y., Acts 1909, ch. 291.

⁹ Conn., Acts 1907, ch. 242; Ind., Acts 1907, ch. 131; N.Y., Con. L., ch. 31, sec. 7.

¹⁰ Md., Pub. G. L., art. 4, sec. 793; Mass., Acts 1906, ch. 463, pt. 3, sec. 95.

¹¹ Cal., Acts 1907, ch. 224.

¹² N.J., Acts 1905, ch. 102.

¹³ N.Y., Con. L., ch. 31, sec. 5.

states,¹ and by the Federal government.² Laws designating the hours of labor on public roads are found in many states, though they apply principally to the working out of taxes, and relate less to the employment of labor than to a regulation by the people, acting through their representatives, of the time of their own service in this particular. They are significant, however, as indicating what is considered a day's labor in a form of public work, though they establish a minimum day (usually eight hours), rather than fix a limit beyond which labor is forbidden.

Unless overtime work is prohibited, the employer may require additional hours of service, either by contract, or in accordance with understood custom, and no additional compensation will be recoverable therefor.³ If overtime labor is prohibited, and is performed at the request of the employer, it has been held that the employee can recover no pay for such excess labor, being equally a violator of the law with his employer, and unable to reap by law the benefit of his illegal act;⁴ so also of the recovery of damages for injuries received while working beyond the prescribed period,⁵ though this is undoubtedly a hard interpretation of the law, since such an act cannot be said to be more than an occasion for the injury, and not usually in any way the cause of it. (See p. 81.)

Additional pay may be required by statute where time beyond

¹ Colo., Supp., secs. 2801a to 2801i; Kans., G.S., secs. 3827 to 3829; N.Y., Con. L., ch. 31, sec. 3; Pa., Acts 1897, No. 374, etc.

² Act of August 1, 1892, 27 Stat. 340.

³ U.S. v. Martin, 94 U.S. 400; *Luske v. Hotchkiss*, 37 Conn. 219, 9 Am. Rep. 314.

⁴ *Short v. Bullion-Beck Min. Co.*, 20 Utah 20, 57 Pac. 720.

⁵ *Lloyd v. R. Co.*, 151 N.C. 536, 66 S.E. 604.

the fixed limit is worked.¹ The Michigan statute to this effect was held not to apply to employment by the week, month, or year.² A statute of Nebraska³ fixing the hours of labor at eight per day, excepting farm and domestic labor from its provisions, and requiring extra pay for overtime labor, was held to be unconstitutional, both as denying the right of contract and as effecting an unjust discrimination against the excepted classes of labor.⁴ In the present state of opinion it cannot be anticipated that any law regulating generally the hours of labor of adult males will be sustained as a restrictive or mandatory measure, their force being nothing more than directory, and subject to control by contract.

Of like nature with laws of this class was a law fixing the number of pounds that make a ton, where the ton is the unit used as the basis for the payment of wages.⁵ It was held that such a law cannot be defeated by merely setting forth a custom of the employer to use a different standard; but if there was a special contract, or if it appears that the employee knew of the custom at the time of hiring, no recovery can be had for the excess over the legal weight.⁶

SECTION 35. *Constitutionality of Statutes Limiting the Hours of Labor.* — Interference with the freedom of contract in such regard is of course justifiable if shown to be a proper exercise of the police power. The limitation of the hours of labor of railroad employees is held to be valid as not only benefiting the employees, but also as conducing to the pub-

¹ Mich., C.L., sec. 5453; Cal., Pol. Code, sec. 3246.

² Schurr v. Savigny, 85 Mich. 144, 48 N.W. 547.

³ Acts 1891, ch. 54.

⁴ Low v. Rees Printing Co., 41 Nebr. 127, 59 N.W. 362.

⁵ Pa., Acts 1834, p. 527, sec. 17.

⁶ Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354.

lic safety;¹ though a lower court of the State of Ohio declared such a law an unwarranted invasion of the right of contract.² It has been held that state laws on the subject will have to give way to the Federal law applicable to interstate commerce, enacted under the commerce power of Congress, on account of the difficulty of separating interstate from intrastate operations; but the better view seems to be that they may exist coördinately, if not in conflict.³ For labor in mines, smelters, and other places where workmen are exposed to unhealthful conditions, it is the welfare of the employee alone that is looked to, this fact being sufficient, on a proper showing, to support the law.⁴ If, however, health is not shown to be in jeopardy, the law will fall.⁵ The Colorado supreme court declared unconstitutional a law limiting the hours of labor of employees in mines and smelters, declaring that the state had no right to interfere in a private business, in which no matter of public welfare is involved, merely to protect the health of an adult male, when the act prohibited, if committed, "will injure him who commits it, and him only."⁶ Fortunately such reasoning has not appealed to our courts generally. The limitation condemned by the court is now embodied in the constitution of the State of Colorado.⁷

¹ *State v. Northern P.R. Co.*, 36 Mont. 582, 93 Pac. 945.

² *Wheeling, B. & T. R. Co. v. Gilmore*, 8 Ohio C. C. Rep. 658.

³ Compare *State v. Missouri P. R. Co.*, 212 Mo. 658, 111 S.W. 500; *State v. Northern P. R. Co.*, *supra*, and *State v. Chicago, etc., R. Co.*, 136 Wis. 407, 117 N.W. 686, with *Lloyd v. R. Co.*, 151 N.C. 536, 66 S.E. 604, and *People v. Erie R. Co.*, 198 N.Y. 369, 91 N.E. 849. See also *Smith v. Alabama*, 124 U.S. 465, 8 Sup. Ct. 504.

⁴ *Holden v. Hardy*, 169 U.S. 366, 18 Sup. Ct. 383; *State v. Cantwell*, 179 Mo. 245, 78 S.W. 569; *State v. Thompson*, 15 Wyo. 136, 87 Pac. 433.

⁵ *Lochner v. New York*, 198 U.S. 45, 25 Sup. Ct. 539. (Bakery employees.)

⁶ *In re Morgan*, 26 Colo. 415, 58 Pac. 1071.

⁷ Art. 5, sec. 25a.

A law regulating the hours of labor of employees on street railways was held to be within the power of the legislature to enact, and therefore constitutional, on three grounds, — that it dealt with public corporations, which are created by and subject to legislative action and control; that it was the regulation of the use of a public franchise; and that it provided for the public safety by protecting employees from excessive strain.¹

The boundary line between constitutional and unconstitutional laws of this class is jealously guarded, and is not yet clearly defined. Thus a New York statute limiting the hours of labor in bakeries² was upheld by the highest court of the state by a majority of one,³ and rejected by the Federal Supreme Court by a like majority,⁴ the entire difficulty being the difference of view between the courts and the members composing them as to what is and what is not a proper exercise of the police power in behalf of the public welfare.

It would appear to be a sufficient support for laws limiting the hours of labor on public works that the state has a right to prescribe the conditions under which its own work shall be performed.⁵ Municipal corporations are but auxiliaries of the state for the purposes of local government, and exercise their powers under grants from the state, subject to restriction or enlargement, as the legislature may from time to time see fit to act.⁵ A contrary view has been taken, however, which is to the effect that such corporations are, in the conduct of local

¹ *In re Ten-hour Law*, 24 R.I. 603, 54 Atl. 602. ² Con. L., ch. 31, sec. 110.

³ *People v. Lochner*, 177 N.Y. 145, 69 N.E. 373.

⁴ *Lochner v. New York*, 198 U.S. 45, 25 Sup. Ct. 539.

⁵ *Williams v. Eggleston*, 170 U.S. 304, 18 Sup. Ct. 617; *Atkin v. Kansas*, 191 U.S. 207, 24 Sup. Ct. 124; *Keefe v. People*, 37 Colo. 317, 87 Pac. 791, *Ryan v. City of New York*, 177 N.Y. 271, 69 N.E. 599.

affairs and the expenditure of money raised by local taxation on the same footing with private corporations, and not subject to the abridgment of their right to contract freely.¹

SECTION 36. *Sunday Labor.* — Where a contract is for the entire time and services of an employee, whether or not this includes labor on Sunday depends on custom and the manner of conducting the business.² The common law does not forbid Sunday labor, but laws have been enacted in nearly every jurisdiction of the United States restricting such labor to works of necessity or charity. The excepted occupations may be enumerated in the statute,³ or it may be left to the courts to decide what occupations come within the language of the law; or the law may be general, with specific designations of some one or more employments. Though laws of this last class are in a sense discriminatory, they have been upheld as constitutional,⁴ though not uniformly.⁵

The operation of passenger trains and of trains carrying live stock and perishable freight is generally allowed, though in a

¹ *People v. Grout*, 179 N.Y. 417, 72 N.E. 464; *City of Cleveland v. Construction Co.*, 67 Ohio St. 197, 65 N.E. 885; *City of Seattle v. Smyth*, 22 Wash. 327, 60 Pac. 1120. It may be noted that after the action of the court of appeals of the state, the people of New York amended their constitution, specifically authorizing the legislature to regulate contracts of employment on public work, in accordance with which ch. 506, Acts of 1906, was enacted. This law has been held constitutional, the court saying that the people have commanded the right of freedom of contract to yield so far as reasonably necessary to permit such regulation. *People ex rel. Williams Eng. & Const. Co. v. Metz*, 193 N.Y. 148, 85 N.E. 1070.

² *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200, 59 N.E. 524.

³ Mass., R.L., ch. 98, sec. 3.

⁴ *Petit v. Minnesota*, 177 U.S. 164, 20 Sup. Ct. 666; *State v. Dolan*, 13 Idaho 693, 92 Pac. 995; *People v. Bellet*, 99 Mich. 151, 57 N.W. 1094.

⁵ *Armstrong v. State*, 170 Ind. 188, 84 N.E. 3; *State v. Granneman*, 132 Mo. 326, 33 S.W. 784; *Eden v. People*, 161 Ill. 296, 43 N.E. 1108.

number of states the operation of trains of any kind is forbidden. Where laws of this sort exist, they are construed as regulations of internal police, and not of commerce.¹ The publication and sale of newspapers, the sale of drugs, tobacco, milk, ice, and the like, are also generally permitted. A common provision is one that exempts from the requirement of the observance of Sunday as a day of rest those who observe another day. A few states have laws requiring the granting to employees of a weekly day of rest, that of Massachusetts being in effect a requirement that workmen employed on Sunday shall be allowed a day of rest within the week following.² The law of Missouri³ applies only to employees in bakeries, while that of California is general.⁴ This state has no Sunday law, strictly speaking, such laws having been held by the courts of the state to be in violation of religious freedom, as compelling the observance of a day held sacred by the believers in one faith and not by others.⁵ Though this opinion was reversed in a later case,⁶ the present law is one requiring a weekly day of rest, the day not being designated. Opposed to the view that laws of this sort have a religious aspect is the one that regards them as social or economic measures, and not as compelling religious observance.⁷ In the *Petit* case it was said that laws of this class are supported as constitutional by "well-nigh innumerable decisions of the state courts," as well as by the uniform course of the Supreme Court.

The effect on the employee's right to recover when he is in-

¹ *Hennington v. State*, 90 Ga. 396, 17 S.E. 1009; affirmed, 163 U.S. 299, 16 Sup. Ct. 1086; *Norfolk & W.R. Co. v. Com.*, 93 Va. 749, 24 S.E. 837.

² Acts 1907, ch. 577.

³ R.S. sec. 10088.

⁴ *Sim's Penal Code*, App., p. 722.

⁵ *Ex parte Newman*, 9 Cal. 502.

⁶ *Ex parte Andrews*, 18 Cal. 678.

⁷ *Petit v. Minnesota*, 177 U.S. 164, 20 Sup. Ct. 666; *Swann v. Swann*, 21 Fed. 299.

jured in work being carried on in violation of Sunday laws is ruled on differently by different courts. Thus it has been held that labor on Sunday in violation of the law is contributory negligence, so that an employee could not recover for injuries received while so laboring, even though the defect causing the injury was due to the employer's negligence;¹ while the contrary rule is laid down elsewhere, on the ground that the employee's act in laboring on Sunday was not more than the remote cause of the accident, the negligence of the employer being the proximate cause.² Clearly the employer should not be allowed to ask for and receive the benefits of such service and then disclaim liability for injuries caused by his own negligence during its performance. It is the law, however, that no recovery can be had for wages for prohibited labor on Sunday,³ and that a contract involving service on Sundays and other days is an entire one, the illegality, so far as the Sunday work is concerned, rendering the contract entirely void, so that the employee can recover nothing in an action at law for any of his services;⁴ though a subsequent promise to pay will support an action for the value of the work done.⁵ Of course no action will lie for a breach of contract for such labor;⁶ but where payments have

¹ *Read v. Boston & A.R. Co.*, 140 Mass. 199, 4 N.E. 227; but see *Newcomb v. Boston Protective Dept.*, 146 Mass. 596, 16 N.E. 555.

² *Hoadly v. Paper Co.*, 72 Vt. 79, 47 Atl. 169; *Railway Co. v. Buck*, 116 Ind. 566, 19 N.E. 453; *Solarz v. Railway Co.*, 29 N.Y.S. 1123, 8 Misc. 656; *Railway Co. v. Towboat Co.*, 23 Howard 209, 3 U.S. 507; *Moran v. Dickinson*, 204 Mass. 559, 90 N.E. 1150.

³ *Carson v. Calhoun*, 101 Me. 456, 64 Atl. 838; *Brunnett v. Clark*, 1 Sheld. 500 (N.Y.).

⁴ *Stewart v. Thayer*, 168 Mass. 519, 47 N.E. 420; *Slade v. Arnold*, 53 Ky. 287; *Williams v. Hastings*, 59 N.H. 373.

⁵ *Telfer v. Lambert*, (N.J.L.) 75 Atl. 779.

⁶ *Bernard v. Lüpping*, 32 Mo. 341.

been made for Sunday labor, they cannot be recovered by the employer on the ground of the invalidity of the contract for such labor.¹

The invalidity of a contract for Sunday labor will not operate to relieve one from the penalty for an additional offense in connection therewith, as the employment of a child in a place where intoxicants are sold, such employment being forbidden, since the service itself is the evil to be guarded against, without regard to the means by which the engagement was in fact procured.² Where the employer is entitled to the defense of fellow-service, the employee cannot overthrow it by showing that he was at work on Sunday in violation of law, and therefore employed under a void contract, and so not an employee.³

¹ *Calkins v. Mining Co.*, 5 S. Dak. 299, 58 N.W. 797.

² *State v. Hall*, 141 Wis. 30, 123 N.W. 251.

³ *Shannon v. Union R. Co.*, 27 R.I. 475, 63 Atl. 488.

CHAPTER IV

REGULATION OF THE PHYSICAL CONDITIONS OF EMPLOYMENT

SECTION 37. *Statutory Control.* — The conditions surrounding employees in their places of employment are the subject of regulation by statute in most of the states of the Union, whereby the freedom of the employer to carry on his business in accordance with his own ideas and plans, secured to him in general by the principles of the common law,¹ is interfered with. The principal groups of laws of this class relate to the conditions of safety and sanitation required in factories, etc., the equipment and operation of railways, mining operations, and the erection and repair of buildings.

SECTION 38. *Regulation of Factories and Workshops.* — Factory regulations range from the simple requirement that the doors of workrooms shall open outwardly as a safeguard in case of fire,² provision for fire escapes being coupled therewith in some cases,³ to an elaborate code covering the guarding of dangerous machinery,⁴ the removal by forced draft of dust and injurious gases,⁵ the adequate provision of light⁶ and air,⁷ and

¹ *Tuttle v. Detroit, etc. R. Co.*, 122 U.S. 189, 7 Sup. Ct. 1166. See also sec. 60.

² *Miss.*, Code, sec. 2272.

³ *Ga.*, Pol. Code, sec. 2622; *S. Dak.*, R.C., secs. 3163, 3165.

⁴ *Kans.*, Acts 1903, ch. 356; *Conn.*, G.S., sec. 4516; *Ind.*, A.S., sec. 7087i, etc.

⁵ *Iowa*, Code, sec. 4999c; *N.Y.*, C.L., ch. 31, sec. 86; *Mass.*, Acts. 1909, ch. 514, secs. 83, 84.

⁶ *N.Y.*, C.L., ch. 31, sec. 81; *Conn.*, G.S., sec. 4518.

⁷ *Ind.*, A.S., sec. 7087o; *N.J.*, Acts 1904, ch. 64, sec. 19.

the supply of suitable water for drinking¹ and for humidifying the atmosphere.² One state prohibits the taking of food into rooms in which poisonous or injurious fumes or dusts are present.³ Toilet rooms and privies may be required, their number fixed in proportion to the number and sex of employees, and their location and condition prescribed.⁴ Where the health of the general public is directly involved, as in the manufacture of bakery products,⁵ of butterine or ice cream,⁶ or of clothing,⁷ the regulations may be even more detailed, as by requiring rooms to be periodically lime-washed, prohibiting the use of cellars, and the like.

Of like nature with some of the above laws are the laws of a few states which have for their object the protection of agricultural labor where machinery is employed, requiring safeguards on horse powers,⁸ or corn huskers or shredders.⁹

SECTION 39. *Steam Boilers.* — The inspection of steam boilers is sometimes provided for in connection with laws relating to factory inspection,¹⁰ but in many states by separate laws.¹¹ This inspection is for the most part confined to stationary boilers and engines, though in a few instances locomotive boilers are included.¹² Marine engines and boilers are required to be in-

¹ Mass., Acts 1909, ch. 514, sec. 78; R.I., Acts 1907, ch. 1429.

² Mass., Acts 1908, ch. 325.

³ Ill., Acts 1909, p. 202, sec. 8.

⁴ Mass., Acts 1909, ch. 514, secs. 79-82, 100; Wis., A.S., secs. 1636-31, 1636-32.

⁵ Cal., Acts 1909, ch. 104; Ind., Acts 1909, ch. 163; Pa., B.P. Dig., p. 62.

⁶ Ill., Acts 1907, p. 309.

⁷ Md., P.G.L., Art. 27, secs. 234-243; N.Y., C.L., ch. 31, secs. 100-105.

⁸ Ill., A.S., ch. 70, sec. 3; Iowa, Code, sec. 5025.

⁹ Mich., Acts 1907, ch. 124; Wis., A.S., sec. 1636-131, *et seq.*

¹⁰ Pa., Acts 1905, No. 226, sec. 19.

¹¹ Conn., G.S., secs. 4890 *et seq.*; Minn., R.L., secs. 2168 *et seq.*

¹² Mass., Acts 1906, ch. 463, Pt. II, sec. 173; N.Y., Con. L., ch. 49, sec. 72.

spected, not only by state laws, but by statutes of the United States as well.¹

SECTION 40. *Railways.* — In respect of the provisions as to locomotive and marine boilers, the interests of the general public coincide with those of the employee to support the law, as is the case in the matter of safety appliances on railways generally, which are likewise the subject of both state and federal legislation. These laws relate to the use of automatic couplers,² power brakes,³ the blocking of frogs,⁴ the installation of telltales or warning strings at the approaches to bridges, tunnels, etc.,⁵ the height of wires, bridges, and other construction work across the tracks of railroads,⁶ the nearness of buildings and other objects to the tracks,⁷ the equipment of freight cars with grab irons, ladders etc.,⁸ the use of adequate headlights on locomotives,⁹ the employment of a sufficient crew for the handling of trains,¹⁰ the adoption and enforcement of suitable rules to control the operation of trains,¹¹ and other matters conceived to add to the safe operation of the roads. Some states authorize the promulgation and enforcement of rules by their state railway commissions.¹²

¹ Minn., R.L., sec. 2173; Mich., Acts 1909, No. 113; U.S., R.S., 4399 *et seq.*, and amending acts.

² U.S., 27 Stat. 531, Comp. Stat., p. 1374; Con. G.S., sec. 3762; Mo., Acts 1907, p. 182.

³ U.S., *loc. cit.*; Del., Acts 1903, ch. 394; Ind., Acts 1907, ch. 118.

⁴ Colo., A.S., sec. 3751d; Mo., Acts 1907, p. 181; Mich., C.L., sec. 6313.

⁵ Conn., G.S., sec. 3731; N.H., P.S., ch. 159, sec. 26.

⁶ Ind., Acts 1907, ch. 118; Mich., C.L., sec. 6324.

⁷ Ind., *loc. cit.*

⁸ Ind., *loc. cit.*; Ill., R.S., ch. 114, sec. 226; Mass., Acts 1906, ch. 463, Pt. II, sec. 162.

⁹ Ark., Acts 1907, No. 402; Ga., Acts 1908, p. 50; Ohio, Acts 1910, p. 330.

¹⁰ Conn., G.S. sec. 3799; Wis., A.S. secs. 1809r *et seq.*

¹¹ Ind., Acts 1907, ch. 272; Mich., C.L., sec. 6286.

¹² Colo., Acts 1907, ch. 208; Vt., P.S., sec. 4611.

Street railway employees must be protected from the inclemencies of the weather by the use of inclosed platforms for motormen in a number of states,¹ while a few direct seats to be furnished for their use.² Some also have safety appliance laws applicable to such roads.³

SECTION 41. *Mine Regulations.*—Laws regulating the operation of mines, providing for ventilation, means of exit, methods of working, the setting and firing of blasts, the use of safety lamps, and for the general inspection and supervision of the work are found in practically all states within whose boundaries mining is carried on.⁴ The Congress of the United States passed a law of this class, applicable to mines in territories until a local law should be passed satisfactorily covering the ground of the Federal law.⁵ Besides the general provisions noted above, the use of speaking tubes or other means of communication may be required; and the guarding of hoistways and sumps, the supply and placing of timbers, the construction and operation of cages for miners and of hoists for coal, the location and quantity of powder stored in or about the mine, safeguards against outbursts of gas and water, and many other details may be provided for by the law.

SECTION 42. *Building Operations.*—The dangers involved in building operations are contemplated in the laws of a number of states, by which the construction, testing, and barricading of scaffolds, staging, etc., are regulated, floors required to be filled in or planked over within designated distances as the work of

¹ Conn., G.S., secs. 3869, 3870; Ind., A.S., sec. 5479; Iowa, Acts 1909, ch. 51.

² Conn., Acts 1909, ch. 237; Oreg., Acts 1909, ch. 59.

³ Cal., Pen. Code, sec. 369a; N.H., Acts 1907, ch. 113.

⁴ Ala., Code, secs. 999-1037; Colo., A.S. secs. 3181-3220; Ill., R.S., ch. 93; Ind., Acts 1905, ch. 50; Pa., B.P. Dig. p. 1340, *et seq.*

⁵ 26 Stat. 1104.

building progresses, or secondary scaffolding required; the guarding of hoistways or shafts, and provisions that hoists, cranes, and other mechanical contrivances shall be so constructed and operated as to protect the life and limbs of employees may also be included.¹ The conditions of employment in compressed air are set forth with considerable particularity in a law² which requires decompression locks and medical and toilet rooms to be provided.

SECTION 43. *Accidents.* — Appliances for rendering medical and surgical aid, as bandages, plasters, absorbent cotton, oil, stretchers, blankets, etc., are to be provided for the care of injured employees in factories and mines, according to the enactments of several legislatures.³

Reports of accidents occurring in mines and factories, sometimes extending to all places of employment,⁴ are required by the laws of some states to be made to either an inspector or some other official. Special laws are found in some states with reference to reporting accidents on railroads.⁵ Many of these laws contain provisions for the investigation of the cause of the accident and the determination of the responsibility therefor.⁶ Such statutes have a close relation to the liability of the employer for injuries to his employees, as well as to the matter of improving the conditions surrounding employees in their places

¹ Conn., Acts 1907, ch. 152; Ohio, Gen. Code, secs. 12576, 12577, 12593 12594; Wis., A.S., secs. 1636-81 *et seq.*; Ill., Acts 1907, p. 312.

² N.Y., Acts 1909, ch. 291.

³ Mass., Acts 1909, ch. 514, sec. 104; Mich., Acts 1907, ch. 152, sec. 6; Ill., R.S., ch. 93, sec. 30; Ind., Acts 1905, ch. 50, sec. 13; Ohio, Gen. Code, sec. 925.

⁴ Ill., Acts 1907, p. 308; Ind., A.S., sec. 7087h; Mo., R.S., sec. 6432.

⁵ Ala., Code, sec. 5666; Minn., Acts 1907, ch. 290; Ohio, Gen. Code, sec. 573.

⁶ Ind., A.S., sec. 7087h; Tenn., Code, sec. 335; Minn., Acts 1907, ch. 290; Pa., B.P. Dig., p. 1356, secs. 196-203; U.S., 31 Stat. 1446, C.S., p. 3176.

of work. Some of them direct the inspector to take steps to prevent the recurrence of like accidents, and to promote the safety or convenience of the public or of employees by requiring proper repairs and improvements to be made.¹

Mere publicity is apparently largely relied upon as a means of securing the changes necessary to remedy the defective conditions, if any, which are found to be the cause of the accident. This may be obtained either by publication,² or by means of reports to the legislature or the governor of the state,³ or by records kept in the books of a state commission.⁴ In other cases it is provided that the facts disclosed and the names of witnesses shall be communicated to the persons injured or to the friends of those killed as the result of the accident, which looks clearly toward facilitating the recovery of damages;⁵ or the law may provide for reports of neglect of duty to be sent to the prosecuting officers of the state.⁶ The opposite view is taken in states in whose law on this subject it is expressly provided that the facts obtained in any such report or investigation shall not be used at any trial of suits for damages,⁷ or in any criminal proceeding on account of such accident.⁸

SECTION 44. *Construction and Interpretation of Safety Statutes.*—The basis of these provisions of law, which it is impos-

¹ In mines: Kans., G.S., sec. 4138; Minn., Acts 1905, ch. 166; Tenn., Code, sec. 335. On railroads: Miss., Code, sec. 4870; Minn., Acts 1907, ch. 290; Vt., P.S., sec. 4611; N.Y., Con. L., ch. 48, sec. 47.

² Ind., Acts 1907, ch. 241; Vt., P.S., sec. 4609.

³ Minn., Acts 1907, ch. 290; Wash., Acts 1907, ch. 226.

⁴ Ala., Code, sec. 5666; Ky., Stat., sec. 777; Mich., Acts 1907, No. 312.

⁵ Conn., G.S., sec. 3800.

⁶ Ind., Acts 1907, ch. 272; Vt., P.S., sec. 4609.

⁷ Ind., Acts 1907, ch. 241; Iowa, Acts 1907, ch. 110; Mont., Acts 1907, ch. 37, sec. 18; N.Y., Con. L., ch. 48, sec. 47; U.S., 31 Stat. 1446, Comp. St. p. 3176.

⁸ Iowa, *loc. cit.*; Mont., *loc. cit.*

sible to more than sketch briefly, and which are being changed and extended constantly, is the police power of the state, exercised, in most instances, in behalf of the welfare of its citizens who are employed, though in some cases the public welfare in its broader sense is obviously concerned. They carry out and are supported by the doctrine laid down by the Supreme Court in the following language: "It is a principle fully recognized by decisions of the state and federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."¹ Nor is it an objection to the constitutionality of such laws that they give grounds for actions which would be without foundation at common law, since it is within the power of the state to change and modify the principles of the common law customarily applicable to the relations of employer and employee in accordance with the conception of public policy adopted by the legislature in view of existing conditions.²

Of a factory inspection law it was said that it was a police regulation for the protection of the lives, health, and morals of the employees in factories, and clearly within the power of the legislature to enact, so that there could be no doubt of its constitutionality and validity;³ while regulations applying to bakeries have regard to the public health, and are within the

¹ *Nashville, C. & St. L. Ry. v. Alabama*, 128 U.S. 96, 9 Sup. Ct. 28.

² *Wilmington Star Min. Co. v. Fulton*, 205 U.S. 60, 27 Sup. Ct. 412.

³ *State v. Vickens*, 186 Mo. 103, 84 S.W. 908; *State v. Hyman*, 98 Md. 596, 57 Atl. 6; *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 851.

legislative power on this account.¹ Mine regulations are clearly within the reasons of the laws affecting factory labor.² Since, however, mine labor is known to be especially dangerous and exhausting, laws looking to the safety of miners may be supported as valid on the ground that the hazards of the employment justify a special classification,³ bringing such laws within the rules laid down in the matter of legislation affecting railway employment.⁴ Of these laws, as of the federal safety appliance laws, the Supreme Court has said⁵ that they do not give the mine owner the privilege of reasoning on the sufficiency of appliances or on the conditions involving reasonable safety, but they fix a standard the maintenance of which becomes the employer's imperative duty, from which he cannot be excused because some workman may disregard instructions. An employer will not be allowed to allege impracticability as an excuse for failing to comply with the law, since to do so "would be the abrogation rather than the construction of the statute."⁶

As to other laws mentioned above as belonging to this class, there is little to be gained by added discussion. Laws for the protection of employees on street railways, requiring the provision of screens or inclosed vestibules, are constitutional,⁷ as are those enacted to secure the safety of employees on buildings,

¹ *Benz v. Kremer*, 142 Wis. 1, 125 N.W. 99.

² *Chicago, W. & V. Coal Co. v. People*, 181 Ill. 270, 54 N.E. 961; *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 22 Sup. Ct. 616; *Sommer v. Coal Co.*, 89 Fed. 54.

³ *Holden v. Hardy*, 169 U.S. 366, 18 Sup. Ct. 383; *Smith v. Woolf*, 160 Ala. 644, 49 So. 395.

⁴ *Missouri P. R. Co. v. Mackey*, 127 U.S. 205, 8 Sup. Ct. 1161. See sec. 90.

⁵ *Deserant v. Cerillos Coal R.R. Co.*, 178 U.S. 409, 20 Sup. Ct. 967.

⁶ *Morris Coal Co. v. Donley*, 73 Ohio St. 298, 76 N.E. 945.

⁷ *State v. Whitaker*, 160 Mo. 59, 60 S.W. 1068.

being within the reasons of the laws of this class generally.¹ They are also subject to the construction of law that permits the employee to lose the benefit of their intention in those jurisdictions that permit the employee to assume the risk of his employer's failure to conform to the provisions of the statute,² or that declares that an employee continuing to work under conditions of such failure bars his right to recovery for resultant injuries because of his act in so continuing, by which he assumes the risks and may also be guilty of contributory negligence,³ — rulings that confirm the importance of a clear statutory declaration of the legislative intent in the enactment of laws of this class, since otherwise the ordinary citizen is unable to determine what are his rights under laws enacted apparently for his benefit, but seemingly capable of being ignored with impunity.

With regard to railways, the question arises as to the control of interstate commerce by Congress; but unless the field is so covered as to exclude state control, matters of intrastate concern may be regulated by state laws if they do not interfere with existing federal statutes.⁴ On this view the full crew laws⁵ have been held valid.⁶ State laws regulating the use of automatic couplers, etc., also come within this rule;⁷ as do laws

¹ *Stewart v. Ferguson*, 34 App. Div. 515 (N.Y.); *Marshall v. Norcross*, 191 Mass. 568, 77 N.E. 1151.

² *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N.E. 1119.

³ *Stewart v. Ferguson*, *supra*.

⁴ *Smith v. Alabama*, 124 U.S. 465, 8 Sup. Ct. 564; *Missouri P. R. Co. v. Flour Mills*, 211 U.S. 612, 29 Sup. Ct. 214.

⁵ Ind., Acts 1907, ch. 11; Ark., Acts 1907, No. 116.

⁶ *Pittsburg, etc., R. Co. v. State*, 172 Ind. 147, 87 N.E. 1034; *Chicago, R.I. & P. R. Co. v. State*, 86 Ark. 412, 111 S.W. 456, affirmed, 219 U.S. 453, 31 Sup. Ct. 275.

⁷ *Detroit, etc., R. Co. v. State*, 82 Ohio St. 60, 91 N.E. 869; *Larabee v. New York, etc., R. Co.*, 182 Mass. 348, 66 N.E. 1032.

requiring telltales or warning strings over tracks at the approach to bridges or tunnels,¹ fixing standards for headlights on locomotives,² and similar legislation.

SECTION 45. *Enforcement.* — In many of the states having laws of this class provision is made for their enforcement by means of special officials or inspectors, as labor bureaus, factory inspection offices, and mine bureaus; while in others this duty devolves on such officers as are charged with the enforcement of the laws generally. It need hardly be added that in states of the latter class the laws are usually inefficiently enforced. The laws of the various states differ in their nature, some being absolute and mandatory in form, directing certain provisions to be made under prescribed conditions, while others commit large discretion to the inspecting and enforcing officers. The latter laws are open to criticism as offering opportunity for a variety of standards as the judgment and disposition of the enforcing officials vary. A law that provided that if it appeared to the enforcing officer that injurious conditions could, to a great extent, be prevented by the use of some mechanical contrivance, he should direct that such contrivance be installed,³ was declared void on the ground that it imposed on the inspector, not the duty of enforcing a law of the legislature, but the power of making a law for an individual, and enforcing such rules of conduct as he might prescribe, which was an unconstitutional delegation of legislative power.⁴

¹ Va., Code, sec. 1294-d; *Chesapeake & O. R. Co. v. Rowsey's Adm'r.*, 108 Va. 632, 62 S.E. 363.

² *St. Louis, I. M. & S. R. Co. v. White*, 93 Ark. 368, 125 S.W. 120; *Atlantic C. L. R. Co. v. State*, (Ga.) 69 S.E. 725.

³ Cal., Act of Feb. 6, 1889.

⁴ *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 Pac. 755.

At what point the line would be generally drawn by the courts is not clear, since much of the detail must of necessity be left to the judgment and integrity of the enforcing officers; and such expressions are quite common as "in the discretion of the chief inspector,"¹ "as the factory inspector may direct,"² "the inspector shall direct the proper drainage,"³ "if it appears to the inspector that such [injurious] inhalation would be substantially diminished";⁴ and to attempt to eliminate discretion entirely is obviously impossible.⁵

SECTION 46. *Disobedience of Laws.* — The power of the state to enact inspection or safety appliance laws of the above classes is not questioned as a general proposition,⁶ and the failure of an employer to comply therewith has been held to be negligence *per se* in cases where injury befalls an employee by reason of such failure;⁷ nor does the employee, in such a view of the law, assume the risks occasioned thereby.⁸ In other courts such failure is classed only as evidence of negligence,⁹ in which view the question of assumption of risks can be raised.¹⁰ The statute

¹ Ind., A.S., sec. 7087i.

² Conn., Acts 1905, ch. 13.

³ Ill., Acts 1907, p. 309.

⁴ Mass., Acts 1909, ch. 514, sec. 84.

⁵ *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 851; *St. Louis Consol. Coal Co. v. Illinois*, 185 U.S. 203, 22 Sup. Ct. 616.

⁶ *City of New York v. Miln*, 36 U.S. 71, 11 Pet. 102; *People v. Smith*, 108 Mich. 527, 66 N.W. 382; *State v. Vickens*, 186 Mo. 103, 84 S.W. 908; *State v. Hyman*, 98 Md. 596, 57 Atl. 6.

⁷ *Klatt v. Lumber Co.*, 97 Wis. 641, 73 N.W. 563; *Evansville Hoop & Stave Co. v. Bailey*, 43 Ind. App. 153, 84 N.E. 549.

⁸ *U.S. Cement Co. v. Cooper*, 82 N.E. 981 (Ind. App.); *Narramore v. R. Co.*, 96 Fed. 298; *Western Furniture Co. v. Bloom*, 76 Kans. 127, 90 Pac. 821.

⁹ *Pitcher v. N.Y., etc., R. Co.*, 127 N.Y. 678, 28 N.E. 136; *Jupiter Coal Min. Co. v. Mercer*, 84 Ill. App. 96.

¹⁰ *Knisley v. Pratt*, 148 N.Y. 377, 42 N.E. 986; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N.E. 1119; *Denver & Rio Grande R. Co. v. Gannon*, 40 Colo. 195, 90 Pac. 853; *Same v. Norgate*, 141 Fed. 247.

may declare failure to comply with the law *prima facie* evidence of negligence, or that the employee assumes only the risks that remain after the employer has complied with the laws calling for safety appliances.¹

The better reason seems to be with the view that disobedience causing injury is negligence, since to permit the employee to assume the risks of his employer's non-compliance with the statute is practically to allow him to enter into a contract of waiver both as to the provisions of the law and as to his rights thereunder, which amounts to allowing the employer and employee to determine what is public policy, disregarding the legislative determination embodied in the law.² The right so to do is indeed maintained in a case in which it was held that if the proprietor, although failing to provide the statutory installation, had yet provided one equally safe and convenient, he had performed his duty under the statute.³ The Supreme Court enounces a contrary rule in a case involving this principle, holding that no one can urge against a system or method fixed by statute one of his own adoption and challenge a comparison between them without virtually denying the police power of the state in this behalf.⁴

The argument to the contrary is that a rule under which it is not possible for the employee to waive the protection of the statute and assume the risks of his employer's known failure to comply with its provisions establishes a liability unknown to the common law. "There is no rule of public policy which prevents an employee from deciding whether, in view of increased

¹ Colo., A.S., sec. 3751e; N.Y., Con. L., ch. 31, sec. 202.

² *Narramore v. R. Co.*, *supra*.

³ *Gorman v. McArdle*, 51 N.Y. St. 248, 22 N.Y. Supp. 479.

⁴ *District of Columbia v. Brooke*, 214 U.S. 138, 29 Sup. Ct. 560.

wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does, indeed, contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs.”¹

The law, however, contemplates this protection by way of prescribed methods and instrumentalities, with reference to the use of which the discretion of the employer is eliminated, in order that the statutory standard may be maintained in all establishments alike; and it is difficult to reconcile the assumption of risks in cases of violation of the statute with that rule of law that condemns waivers of the employer's liability in advance of the receipt of the injury.² Nor is it clear how a view that insists that assumption of risks is a matter of law, imposed on the employee “regardless of the desires of the master or the servant,”³ is supported by an argument that adduces the principles of “free agency and the right to manage their own affairs.”⁴ No fact is more frequently reiterated, moreover, in any review of labor legislation than that it is no longer the intention of the state to leave employer and employee to the untrammelled exercise of their free agency, so-called, but that

¹ *Knisley v. Pratt, supra*. See, however, a recent opinion by the same court (*Rhodes v. Sperry, etc., Co.*, 193 N.Y. 223, 85 N.E. 1097), in which it was said that the fact that a law created a liability unknown to the common law was no objection to its constitutionality, as the legislative power was not so limited. The plea of assumption of risks is now abolished in New York, where the injury resulted from the employer's failure to comply with safety statutes. C.L., ch. 31, sec. 202. See *Persons v. Bush Terminal Co.*, 125 N.Y. S. 277, 68 Misc. Rep. 573.

² Sec. 73.

³ *Denver & R.G.R. Co. v. Norgate, supra*.

⁴ *Knisley v. Pratt, supra*.

its bounds are to be fixed for the sake of the general welfare of the whole people.¹

Statutes are not wanting that formally enlarge the liability at common law by abrogating the defense of assumed risks² or of contributory negligence,³ or both, as in some of the laws cited, where the employer ignores the law as to safety appliances; and under the view that assumption of risks is a matter of contract, it would appear that the laws prohibiting contracts of waiver of the provisions of statutes must necessarily be construed as barring this defense; so also of laws that give to an employee injured by reason of the failure of the employer to conform to the requirements of the statute the same rights of recovery as if he were not an employee,⁴ since it is only of an employee that it could be said under any circumstances that he assumed the risks of another's undertaking. A well known text writer has said:—

“When the legislature of a state or the council of a municipal corporation, having in view the promotion of the welfare or the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, otherwise called negligence *per se*, and this irrespective of all questions of the exercise of prudence, diligence, care, or skill, so that if it is the

¹ See “Police power,” sec. 5.

² Ill., Acts 1905, p. 350, sec. 9; Ind., A.S., sec. 5173c, Acts 1907, chs. 118, 131; Iowa, Code, sec. 2083, Acts 1907, ch. 181; Mass., R.L., ch. 111, sec. 209; U.S., 27 Stat. 531, Comp. St. p. 3174.

³ Miss., Code, sec. 4051; Mo., Acts 1907, p. 181; Ohio, Gen. Code, secs. 8945, 8955.

⁴ Mass., Acts 1909, ch. 514, sec. 127; Miss., Const., Art. 7, sec. 193.

proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor." ¹

There is, however, a strong list of cases on the other side of this question, holding that the employee may assume the risks of such disobedience of the law by his employer. ²

A statute prescribing certain protective arrangements and abrogating the defense of contributory negligence, imposing

¹ 1 Thompson Neg. sec. 10. For an extended and interesting discussion of these points see *Caspar v. Lewin*, 82 Kans. 604, 109 Pac. 657.

² *Denver & R.G.R. Co. v. Gannon*, 40 Colo. 195, 90 Pac. 853, and cases cited; 2 Labatt M. & S., sec. 650, 21 A. & E. Enc. Law, 478; 6 L.R.A. (N.S.) 981. The importance of clear legislative declaration as to the intent of the law is emphasized by a comparison of the citations found in the above sources, with which may be taken those given in *Western Furniture & Mfg. Co. v. Bloom*, 76 Kans. 127, 90 Pac. 821. The situation in a state without such a declaration is set forth in Minnesota, whose law (R.L. sec. 1813) directs dangerous machinery and appliances to be fenced or otherwise protected "as far as practicable." In construing the law the supreme court of the state held that on a showing that a guard is practicable, its omission constitutes negligence (*Callopy v. Atwood*, 105 Minn. 80, 117 N.W. 238), described in *Swenson v. Osgood & Blodgett Co.* (91 Minn. 509, 98 N.W. 645) as negligence *per se*. The duty of proving practicability devolves on the plaintiff. (*Glockner v. Hardwood Mfg. Co.*, 109 Minn. 30, 122 N.W. 465.) In another case it was stated that the statute was merely declaratory of the common law. (*Bredeson v. Lumber Co.*, 91 Minn. 317, 97 N.W. 977.) This view was said in a later case to be obiter, and that the statute did in fact change the common law so as to make it negligence in law or *per se* not to guard dangerous machinery where it was practicable to guard it, though the defenses of assumed risks and contributory negligence remain as at common law (*Davidson v. Flour City Works*, 107 Minn. 17, 119 N.W. 483; *Glockner v. Hardwood Mfg. Co.*, 109 Minn. 30, 123 N.W. 807), and the plaintiff was denied recovery in a case in which it was held that he was guilty of contributory negligence in using an unguarded saw which it was practicable to guard. (*Parker v. Lumber Co.*, 85 Minn. 13, 88 N.W. 261.) It is said, however, that it is only where reasonable minds could clearly draw but one conclusion from the undisputed evidence that the question of assumption of risks should be decided by the court; and the mere fact that a workman knew that a dangerous machine was not guarded was not sufficient to take the case from the jury on this point. (*Shaver v. Lumber Co.*, 109 Minn. 376, 123 N.W. 1076.)

an absolute liability for injuries resulting from non-compliance with its provisions¹ has been declared constitutional;² so also of one that modifies the defense by providing for the determination of degrees of negligence, introducing the doctrine of comparative negligence.³

SECTION 47. *Sufficient Compliance.* — While an inspector's certificate of approval of installations and appliances may be admitted as prima facie evidence of compliance with the statute, it is not conclusive, and an injured employee may overthrow the presumption raised thereby by means of suitable proof.⁴ In the construction of the federal statute relative to railroad equipment and maintenance, the Supreme Court has enforced a rule of strict compliance. Thus it is not sufficient that couplers used in a train shall couple automatically when used with others of the same make, but they must couple automatically with those in use in the train as actually constituted.⁵ Furthermore, the height fixed for drawbars must be maintained at the employer's own hazard, the duty being an absolute one, and not being capable of discharge by the use merely of reasonable care, or by its delegation to competent persons to whom the necessary supplies are furnished. The legislature having prescribed conditions of appliances, the employer's discretion no longer controls, and nothing less than the legislative require-

¹ Wis., A.S., sec. 1810.

² Quackenbush v. R. Co., 62 Wis. 411, 22 N.W. 174.

³ Nebr., Acts 1907, ch. 48; Missouri P. R. Co. v. Castle, 172 Fed. 841 (C.C.A.). See further, sec. 77.

⁴ Vosberg v. Lumber Co., 45 Wash. 670, 89 Pac. 168. See *per contra*, Pauley v. Steam Gauge & Lantern Co., 131 N.Y. 90, 29 N.E. 999, in which the inspector's certificate was held to relieve the employer, though the instrumentality (a fire escape) did not conform to the law, and was accessible only with great effort and risk.

⁵ Johnson v. Southern P. R. Co., 196 U.S. 1, 25 Sup. Ct. 58.

ments will be regarded as reasonable care in the circumstances.¹ It is not enough to have proceeded in the direction of a compliance, as by providing an inadequate light when the statute requires one that will distinctly disclose the surroundings.² And it has been held that it is not permitted to plead good faith where an inspection has actually been made by proper persons, whose judgment was that a working place did not require marking as dangerous, though subsequent events showed that it was in fact dangerous.³ The employer is liable in such case as for a willful violation of the law, since whether or not an adequate inspection has been made is not within the province of the employer to decide, but is a question for the jury.

SECTION 48. *Sale of Liquor to Employees.* — As detrimental to the interests of the parties to a labor contract, the establishment of saloons or other places for the sale of intoxicants at or near construction camps is prohibited in one state;⁴ and this law has been held to be a reasonable exercise of the police power of the state in view of the mischief likely to follow the activities of itinerant vendors of intoxicants.⁵ Other statutes authorize employers to forbid the sale of intoxicants to designated employees,⁶ or prohibit the use of intoxicants on any engine, car, or train propelled by steam or electricity, except in a buffet or dining car;⁷ or forbid the bringing of intoxicants into any mine, smelter, machine shop, or sawmill.⁸

¹ St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 28 Sup. Ct. 616.

² Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 N.E. 691.

³ Aetitus v. Coal Co., 246 Ill. 32, 92 N.E. 579.

⁴ Cal., Acts 1909, ch. 413.

⁵ *Ex parte King*, 157 Cal. 161, 106 Pac. 578.

⁶ Minn., Acts 1909, ch. 198; Mass., R.L., ch. 100, sec. 63; Ohio, Gen. Code, sec. 6203; S. Dak., Acts 1903, ch. 165.

⁷ Ohio, Gen. Code, sec. 13,196.

⁸ Wyo., Acts 1909, ch. 32.

CHAPTER V

EMPLOYMENT OF WOMEN AND CHILDREN

SECTION 49. *Special Regulations.* — It is an incident of modern industry that a special body of laws has been formulated relating to the employment of women and children. The common law left them or those who had them under legal control to make such contracts of employment as they saw fit, or rather, perhaps, as they were constrained to make from the force of circumstances. At the present time, in nearly every jurisdiction are to be found laws fixing the age below which children cannot be employed, the limit ranging from twelve to sixteen years. Exemption may be made in cases of orphanage, of poverty, or of dependence of parents; also as regards specified employments, such as farm labor and the canning and preserving of fruits. Labor in mines is prohibited for women and children in a number of states, the age limit for children frequently being higher in this than in other employments. Factories and workshops, or these and mercantile establishments, are most frequently designated as forbidden places of employment for children in industry; while still more numerous laws prohibit classes of occupations, designated as injurious or immoral, such as employment for acrobatic exhibitions, as pedlars, in barrooms, for mendicant purposes, and the like. There is sometimes a list of designated dangerous

factory employments, including the cleaning of moving machinery, the operation of elevators, and of certain kinds of rolls, presses, etc. In some states these laws include females in a part or all of their prohibitions, laws of this class being in effect special extensions of the laws relating to the inspection of factories and workshops.

Numerous laws have been enacted restricting absolutely the hours of labor of children,¹ or of women,² or of both,³ laws of the third class being most common. These laws have a double aspect, the public being concerned in the question of a healthful citizenship, as well as in the protection of classes of individuals who are in a sense under the particular protection of the state.⁴ Limitations may also be made in the matter of night work. In some states eight hours is the maximum day's work allowed for children,⁵ while a more common limit is nine or ten hours, reaching as high as eleven in one instance.⁶ The range of night work prohibited also varies, as from six P.M. to seven A.M.,⁷ seven P.M. to six A.M.,⁸ seven P.M. to seven A.M.,⁹ to the less favorable limit of from nine P.M. to six A.M.,¹⁰ or even ten P.M. to six A.M.¹¹

The required proof of age is usually either by affidavit or certificate, including in the latter case a transcript of the birth,

¹ Cal., Acts 1905, ch. 18; Ind., A.S., sec. 7087a; Ala., Code, sec. 6430.

² Ore., Acts 1907, ch. 200; Wash., Acts 1901, ch. 68.

³ Mass., Acts 1909, ch. 514, sec. 48; Conn., Acts 1907, ch. 251; N.J., G.L., p. 2350.

⁴ *Muller v. State*, 208 U.S. 412, 28 Sup. Ct. 324; *Com. v. Hamilton Mfg. Co.*, 120 Mass. 383; *People v. Ewer*, 141 N.Y. 129, 36 N.E. 4; *State v. Shorey*, 48 Ore. 396, 86 Pac. 881.

⁵ Ill. R.S. ch. 48, sec. 20; Colo., Supp., sec. 2801e; Neb., Acts 1907, ch. 66.

⁶ N.C., Acts 1907, ch. 463.

⁷ Mich., Acts 1901, ch. 113; Ore., Acts 1905, ch. 208.

⁸ Mass., Acts 1909, ch. 514, sec. 56.

⁹ Minn., Acts 1907, ch. 299.

¹⁰ Idaho, Acts 1907, p. 248.

¹¹ Cal., Acts 1907, ch. 524.

school records, or other documents. The regulations as to employment sometimes vary for the time during the vacation of school from those in force during the school term, and for illiterates as compared with literate children. The detail and variety of the laws of this class, and the constant modification of them in the various states, make an analytical account of them impracticable in a work that contemplates only a general survey of the laws relating to labor.¹

The right of the state to protect children in employment is practically universally recognized in respect of all the points named.² It has been said that "so far as such regulations control and limit the powers of minors to contract for labor, there never has been and never can be any question as to their constitutionality."³ Laws affecting safety and sanitation in establishments where women are employed are likewise generally approved;⁴ but laws limiting the hours of labor of women have been held to be unconstitutional in a few instances, on the ground that they interfered with the freedom of citizens to contract, infringing on the present-day equality of rights of women with those of men.⁵ In a later case in one of these courts a law limiting the labor of women in certain employments to ten

¹ See, for example, Ill., R.S., ch. 48, secs. 20-20m; Mass., Acts 1909, ch. 514, secs. 56-77; Ore., Acts 1905, ch. 208; Minn., Acts 1907, ch. 299, Acts 1909, ch. 499; N.Y., C.L., ch. 31, secs. 60-93.

² *Ex parte* Spencer, 149 Cal. 396, 86 Pac. 896; *Bryant v. Skillman Hardware Co.*, 76 N.J.L. 45, 69 Atl. 23; *Starnes v. Mfg. Co.*, 147 N.C. 556, 61 S.E. 525; *State v. Shorey*, *supra*.

³ 1 Tiedeman, *State and Federal Control*, p. 335, citing *People v. Ewer*, *supra*.

⁴ *Wenham v. State*, 65 Nebr. 394, 91 N.W. 421; *Com. v. Beatty*, 15 Super. Ct. (Pa.) 5.

⁵ *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454; *People v. Williams*, 189 N.Y. 131, 81 N.E. 778. See also Tiedeman. *loc. cit.*

hours per day¹ has been held constitutional as a health regulation for the good of the race.² In the Williams case, a law prohibiting night work by women was declared unconstitutional by a New York court on the ground that it was not a health law, but a labor law, and unduly discriminatory between citizens, the court remarking that woman is no more the ward of the state than is man. The act was specifically condemned because it not only sought to regulate the hours of labor of women, but it absolutely prohibited her employment for any time, however brief, between certain hours of the night. But even the concession indicated by this statement would not save the law from condemnation by a court that regarded the liberty of contract as the paramount consideration. In most courts,³ including the Supreme Court of the United States, however, the view is taken that laws of this nature are within the police power of the state as health regulations, sex distinctions warranting a discrimination between men and women engaged in like occupations, "having in view not merely her own health, but the welfare of the race."⁴ A law limiting the hours of labor of females in industrial employments, not applying to work in canning establishments, was said not to be unconstitutional by reason of this exception.⁵ The same principle that supports the foregoing laws would support the laws found in a majority of the states directing employers to furnish seats for female employees and to permit

¹ Ill., Acts 1909, p. 212.

² W. C. Ritchie & Co. v. Wayman, 244 Ill. 509, 91 N.E. 695.

³ Com. v. Hamilton Mfg. Co., *supra*; Wenham v. State, *supra*; State v. Buchanan, 29 Wash. 602, 70 Pac. 5; State v. Muller, 48 Ore. 252, 85 Pac. 855; Muller v. State, *supra*.

⁴ Muller v. State, *supra*.

⁵ Withey v. Bloem, 163 Mich. 419, 128 N.W. 913.

their reasonable use.¹ One state has such a law requiring seats to be supplied for the use of children.²

SECTION 50. *Effect of Unlawful Employment on the Employer's Liability.* — The effect on the employer's liability of his disregard of the laws forbidding the employment of children is on much the same footing with that of other violations of statutory provisions affecting employment conditions.³ Thus some courts hold that the employment of a child under statutory age, who is injured in the course of his prohibited employment, is negligence *per se* on the part of the employer;⁴ while in others it is regarded only as evidence of negligence.⁵ In the former view, the unlawful employment resulting in injury supports an action for damages, in which it has frequently been held that the defenses of assumed risks and contributory negligence, cannot be offered;⁶ and even where it is only evidence of negligence, it has been said that if the jury finds from all the evidence that the employment was negligence, and that injury resulted therefrom, there can and should be a recovery in the case;⁷ while in the Marino case, the court refused to allow the defenses of assumed risks and contributory negligence. In another jurisdiction, it was made the ground of reversal of the judgment of

¹ Ala., Code, sec. 6857; Conn., G.S., sec. 4703; Iowa, Code, sec. 4999; Pa., B.P. Dig., p. 902.

² Okla., Acts 1909, p. 629, sec. 6.

³ See sec. 46.

⁴ *Leathers v. Tobacco Co.*, 144 N.C. 330, 57 S.E. 11; *American Car Co. v. Armentraut*, 214 Ill. 509, 73 N.E. 766; *Smith's Admr. v. Coal & Iron Co.*, 135 Ky. 671, 117 S.W. 280; *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S.W. 678.

⁵ *Stehle v. Jaeger Automatic Machine Co.*, 220 Pa. 617, 69 Atl. 1116; *Marino v. Lehmaier*, 173 N.Y. 530, 66 N.E. 572.

⁶ But see *per contra*, *Darsam v. Kohlmann*, 123 La. 164, 48 So. 781.

⁷ *Stehle v. Jaeger Automatic Machine Co.*, *supra*; see also same case, 225 Pa. 348, 74 Atl. 215, and *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. 311, 67 Atl. 642, in which both defenses were disallowed.

a lower court because the trial judge had held that the doctrine of assumed risks had no application in a case in which a child thirteen years of age was injured in the course of his employment;¹ while in a similar case the decision of the same judge was to the effect that a child under fourteen years of age is presumed to be incapable of assuming the risks of employment, though the matter is one for the jury.² In neither of the last two cases was a statute violated, the presumption being one of common law. Where a statute prohibits the employment of a child under a fixed age, the child's or his parent's misrepresentation is no defense in an action against the employer for injury resulting from the unlawful employment,³ and evidently a contrary ruling would allow unlimited violation of the law. The fact that a child had been employed before the law was enacted in no way removes him from its operation when it comes into effect.⁴

The fact of the subordination of the child to the parent and of the parent's interest in the child's earnings gives rise to the rule of law that where injury results to the child, the parent may recover damages for the loss he himself suffers on account of the interruption to or diminution of the child's earning capacity, the recovery being limited in this respect to the value of such services during minority.⁵ The parent in making the contract assumes the risks of the particular employment for which the

¹ *Alexander v. Carolina Mills*, 83 S.C. 17, 64 S.E. 914.

² *Owens v. Laurens Cotton Mills*, 83 S.C. 19, 64 S.E. 915.

³ *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415, 81 Pac. 869; *American Car Co. v. Armentraut*, *supra*.

⁴ *Stehle v. Automatic Machine Co.*, 225 Pa. 348, 74 Atl. 215.

⁵ *Union P. R. Co. v. Fort*, 84 U.S. 553, 21 L. Ed. 739; *Shields v. Yonge*, 15 Ga. 356, 60 Am. Dec. 698.

contract was made, but of that only; so that if the child is directed to perform other duties and is injured thereby, the defense of assumed risks will not be allowed against the parent's claim.¹ This claim and recovery by the parent for damages is independent of the child's right to recover for personal injuries, and separate recoveries may be had for the two elements of damage.²

SECTION 51. *Wages of Married Women and Minors.* — At common law a married woman entering service was assumed to be hired out by her husband, so that her earnings belonged to him; but most states now give married women the right to their earnings as their individual property.³ So also of minors, who are unable to make valid contracts, generally speaking, and whose earnings belong to the parent unless it can be made to appear that they have been emancipated, or that the parent has failed in the discharge of the parental duties. Legislation has modified these rules of the common law in a number of states, so that the payment of their earnings to minors is valid unless or until notice is given by the parent or guardian that he claims such earnings.⁴ One state⁵ provides that the wages of a minor shall be exempt from garnishment or other process on account of the debts of the parent.

In this connection may be mentioned laws found in a few states providing penalties for able-bodied parents who hire out

¹ *Union P. R. Co. v. Fort, supra*; *Braswell v. Cotton Oil Mill Co.*, 7 Ga. App. 167, 66 S.E. 539.

² *Stehle v. Jaeger Automatic Machine Co.*, 225 Pa. 348, 74 Atl. 215.

³ Ill., R.S., ch. 58, sec. 7; Mass., R.L., ch. 153, sec. 4; N.Y., C.L., ch. 14, sec. 60.

⁴ Cal., Civ. Code, sec. 212; Minn., R.L., sec. 1812; N.Y., C.L., ch. 14; sec. 72.

⁵ Va., Code, sec. 3652c.

their minor children and live in idleness on their earnings ; ¹ the hiring out of wives is coupled with that of children in Louisiana and North Carolina. The laws generally provide for the punishment of the delinquent parent as a vagrant.

Laws of which it must be said that their reason and validity seem doubtful are found in a very few jurisdictions making special provisions relative to the wages of women ; as, for instance, one prohibiting deductions from their wages on account of the stoppage of machinery unless they are allowed to leave the factory,² or one that declares no property exempt in case of a judgment for wages earned by a female, if the judgment and costs do not exceed a specified sum ; ³ special allowances of costs are also made. No good reason appears why distinctions should be made between adult females and other adults in regard to such matters.

¹ Ala., Code, sec. 7843 ; Ga., Acts 1905, p. 109 ; La., Acts 1904, No. 178 ; Miss., Code, sec. 5055 ; N.C., Rev., sec. 3740 ; Tenn., Acts 1907, ch. 256 ; Texas, Acts 1909, ch. 59 ; Va., Code, sec. 884.

² Mass., Acts 1909, ch. 514, sec. 119.

³ Mich., C.L., sec. 900 ; N.Y., Code Civ. Pro., sec. 3131. The New York law applies to Brooklyn only, and gives execution against the person.

CHAPTER VI

RESTRICTIONS ON EMPLOYEES

SECTION 52. *Examination, Registration, etc., of Workmen.* — The conditions and requirements of certain occupations are such that the welfare of fellow workmen or of the public or of both is dependent on the experience and technical ability of the employee. Thus in mining, it has been declared the policy of the state in several jurisdictions to require certain employees, as managers, mine foremen, fire bosses, and hoisting engineers, to prove their qualifications by passing an examination and giving proof of experience, after which a certificate is issued, without which employment in the designated capacity is prohibited.¹ Such laws also penalize an employer who hires employees of these classes without their having the proper credentials. The second class of laws named, *i.e.*, affecting the public only, is represented by laws requiring barbers to be examined and procure licenses;² while both the fellow servant and the public are interested in the efficiency of railway employees. Laws relating to them may contemplate, among other qualifications, physical incapacity, as color blindness of employees whose duties require them to distinguish signals;³ or they may

¹ Ala., Code, secs. 1006, 1007; Ill., Acts 1907, p. 387; Ind., Acts 1905, ch. 50, secs. 21, 22; Mo., Acts 1903, p. 242.

² Md., Acts 1904, ch. 226; Wis., A.S., secs. 1636-18 to 1636-30; Mich. Acts 1899, No. 212; Ore., Acts 1903, p. 27.

³ Ala., Code, secs. 5481-5483, 7655; Mass., Acts 1906, ch. 463, Pt. II, sec. 179; Ohio, Gen. Code, sec. 12,548.

look merely to the technical skill and experience needed by a telegraph operator whose duties are connected with the movements of trains.¹

Other classes of employees coming within regulations of this sort are horseshoers,² plumbers,³ electricians,⁴ elevator operators,⁵ stationary firemen,⁶ steam engineers,⁷ street railway employees,⁸ and, in some states, all coal miners.⁹

SECTION 53. *Status of Certified Employees.* — The objects in view in the enactment of these laws are various, as their wide range would indicate. That foremen in charge of gaseous mines should be competent, or that mine managers and other employees having special duties affecting safety should be able to prove their fitness for their positions is no less important than that places and appliances should conform to a reasonable standard of safety.¹⁰ Courts have taken radically different views as to the status of such certified employees as the law compels to be put in charge of work or places. Thus, the law of 1891 of the state of Pennsylvania, requiring the employment of certified mine foremen, contained the provision that for in-

¹ Ga., Code, sec. 2237.

² Colo., A.S., secs. 2801t-2801z; Minn., R.L., secs. 2354-2356.

³ Cal., Sims' G.L., Nos. 2838, 2839; Ill., R.S., ch. 24, secs. 498-504; Mass., R.L., ch. 103; Pa., Acts 1909, No. 657.

⁴ Minn., R.L., secs. 2357-2364; La., Acts 1908, No. 178.

⁵ Minn., R.L., sec. 761.

⁶ Mass., R.L., ch. 102, secs. 78-86; Mont., Pol. Code, secs. 560 *et seq.*, Acts 1905, ch 32.

⁷ Ala., Code, sec. 7091; Minn., R.L., secs. 2174, *et seq.*; Ohio, Acts 1910, p. 361; Pa., B. Dig., p. 535, Acts 1905, No. 75.

⁸ N.Y., Con. L., Ch. 49, sec. 63; Wash., Acts 1901, Ch. 103.

⁹ Ill., Acts 1909, p. 284; Pa., B. Dig., p. 448 (in anthracite mines only).

¹⁰ *Wilmington Star Min. Co. v. Fulton*, 205 U.S. 60, 27 Sup. Ct. 412; *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N.E. 902; *State v. Murlin*, 137 Mo. 297, 38 S.W. 923.

juries to person or property caused by violations of the act by such mine foremen, the company should be liable in damages. In the trial of an action under this provision,¹ the supreme court of the state declared this provision unconstitutional, holding that the compulsory employment of a certified employee took out of the hands of the employer his discretion and therefore his responsibility in the matter. The mine foreman was held to be the representative of the state, for whose incompetency, if any, the employer could not be made legally responsible. He was also held to be but a fellow servant of the miners, and in no sense the employer's vice-principal, the declaration of the statute to the contrary notwithstanding. This view is followed in other jurisdictions, the court stating in one instance that when the employer had complied with the law by employing a certified mining boss, no liability attaches for the tortious and negligent acts of the latter.²

The divergency of views held in different jurisdictions in regard to the common law doctrine of vice-principalship is noted elsewhere,³ and it is but natural that this divergence should affect the construction of statutes that are quite similar in phraseology. The Illinois doctrine of vice-principalship differs from that accepted in Pennsylvania, and in a case in which the same point as that above discussed was being considered by the Illinois supreme court under a law of practically the same form, the court reviewed the *Durkin* and *Williams* cases, and rejected the

¹ *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237. See also *Golden v. Coal Co.* 225 Pa. 164, 73 Atl. 1103.

² *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S.E. 107, citing 14 A. & E. Enc. Law, 809; *McMillan v. Coal & Coke Co.*, 61 W. Va. 531, 57 S.E. 129; *Coal Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.

³ See secs. 82-88.

doctrine therein laid down, holding that the duties of inspection and management were the employer's, which he might himself perform if qualified, otherwise to be performed through some other person who has been able to obtain a certificate; but being still the master's duties, he is responsible for the negligent performance of them, whether by himself or by his agent.¹ The fact that he is required to employ a manager who is certified by the state was held to be without significance as relieving him from responsibility, as the employer was under no obligation to employ or retain any particular individual, and could discharge for cause of incompetence or otherwise, the effect of the law being simply to eliminate the obviously unfit, and to form a class from which the employer might reasonably expect to procure a fit representative in this respect, but not to enable him to shift his responsibility to his employees by reason of the act.² This view and construction of the law were adopted by the Supreme Court in a case³ in which this point was under consideration in an action arising under the Illinois statute, and it seems clear that such a rule is both better law and better reason. The statute may explicitly put the matter at rest by declaring that the manager or foreman provided for by the act shall be regarded as the representative of the mine owner, and not as the fellow workman of the miners,⁴ such an enactment being clearly within the power of the state legislature.⁵

¹ *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 77 N.E. 902.

² See further *Consol. Coal Co. v. Seniger*, 179 Ill. 370, 53 N.E. 733; *Smith v. Dayton Coal & Iron Co.*, 115 Tenn. 543, 92 S.W. 62; *Poli v. Coal Co.*, (Iowa) 127 N.W. 1105.

³ *Wilmington Star Min. Co. v. Fulton*, 205 U.S. 60, 27 Sup. Ct. 412.

⁴ Tenn., Acts 1907, ch. 540.

⁵ *Wilmington Star Min. Co. v. Fulton*, *supra*; *Western U. Tel. Co. v. Milling Co.*, 218 U.S. 406, 31 Sup. Ct. 59. In the latter case it was said that "The com-

SECTION 54. *Grounds for Legislative Interference.* — The law of Pennsylvania requiring all miners in anthracite mines to have certificates of competency has been judicially enforced as a measure to secure the safety of the employees.¹

Laws classifying stationary engineers and requiring them to procure licenses are held constitutional² on the ground that they are a police regulation designed to secure public safety by requiring only competent persons to be entrusted with the control of dangerous and widely used instrumentalities; though a law of Ohio, providing that if on examination an applicant was found to be trustworthy and competent, a license should issue,³ was declared unconstitutional as interfering with the rights of citizens and affecting their equality, as well as conferring autocratic power on the examiner, for whom the legislature had fixed no standard.⁴

In the matter of railroad employees, the question of unconstitutional interference with interstate commerce was raised in a case that arose under an earlier statute of Alabama that applied only to locomotive engineers. The supreme court of the state and of the United States overruled the contention, holding that the law was but a reasonable exercise of the police power of the state, and not a commerce law.⁵ The present law extends

mon law did not become a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, . . . but however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it."

¹ *Com. v. Shaleen*, 215 Pa. 595, 64 Atl. 797.

² *State v. McMahon*, 65 Minn. 453, 68 N.W. 77; *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 115 N.W. 167.

³ Acts 1900, p. 33.

⁴ *Harmon v. State*, 66 Ohio St. 249, 64 N.E. 117.

⁵ *McDonald v. State*, 81 Ala. 279, 2 So. 829; *Smith v. Alabama*, 124 U.S. 465, 8 Sup. Ct. 564.

the test as to color blindness to trainmen, trackmen, switchmen, and train dispatchers, and has been construed in the same manner as the more limited law.¹ A provision in the earlier law that required the railroad company to pay the fees for the examinations was declared unconstitutional by the state court,² though the Supreme Court of the United States³ upheld in its entirety a statute embodying this provision as to the payment of fees. A law prescribing the length and grade of service of various classes of employees prior to their appointment or promotion⁴ was declared unconstitutional by the supreme court of Ohio⁵ in a memorandum adopting the opinion of the court below,⁶ in which it was said that the law affected unequally employees in the same class of service, and was therefore repugnant to the constitution; but whether or not in any particular instance a law of this class is aptly drawn, or proper provisions are incorporated for its enforcement, it does not seem open to question that the power of the state cannot be held to fall short of prescribing standards of ability and competence in matters affecting the public welfare.

Within these reasons fall the laws which restrict the practice of plumbing to workmen who have been able to prove competency and secure licenses to prosecute their trade;⁷ though it has been held that inspection and not a restrictive licensing law is the proper method of reaching the desired end,⁸ a law of the latter

¹ Nashville, etc., R. Co., v. Alabama, 128 U.S. 96, 9 Sup. Ct. 28.

² Louisville & N. R. Co. v. Baldwin, 85 Ala. 619, 5 So. 311.

³ Nashville, etc. R. Co. v. Alabama, *supra*.

⁴ Ohio, Acts 1893, p. 20.

⁵ State v. Cleveland, etc., R. Co., 70 Ohio St. 506, 72 N.E. 1165.

⁶ 26 Ohio C. C. Rep. 348.

⁷ Douglas v. People, 225 Ill. 536, 80 N.E. 341; Davidson v. State, 77 Md. 388, 26 Atl. 415.

⁸ State v. Smith, 42 Wash. 237, 84 Pac. 851.

class being in this case declared unconstitutional. How far such laws may properly go is, indeed, a question not yet decided, nor is it easy of decision. The law relating to the licensing of horseshoers, for instance, has repeatedly been held to be an unwarranted and arbitrary interference with the liberty of the citizen and his right of private property.¹ The same language was used in a case in which a law licensing plumbers was under consideration,² though such a view is without doubt opposed to the better opinion, since such an employment too closely affects the welfare of the public to demand that it shall not be subject to proper restrictions as to its practice.³

In the case of barbers there is usually coupled with the question of skill that of personal freedom from contagious and infectious diseases, and of such knowledge of the more common affections of the skin as will enable them to shave one suffering from them without aggravating their condition; so that there is here clearly in view the protection of the public health. The board of examiners is also frequently a board of inspection as to the conditions maintained in shops. Within the range of health provisions, these laws command support under the police power of the state.⁴ Where, however, under the guise of regulation, provisions are introduced whose apparent intent is to restrict the practice of the trade by unreasonable requirements and limitations, such provisions will be declared uncon-

¹ *Bessette v. People*, 193 Ill. 334, 62 N. E. 215; *People v. Beattie*, 89 N. Y. Supp. 193, 96 App. Div. 383; *In re Aubry*, 36 Wash. 308, 78 Pac. 900.

² *State v. Smith*, *supra*.

³ *Caven v. Coleman* (Tex. Civ. App.), 96 S.W. 774; *State v. Gardner*, 58 Ohio St. 599, 51 N.E. 136.

⁴ *State v. Briggs*, 45 Ore. 366, 77 Pac. 750; *Ex parte Lucas*, 160 Mo. 218, 61 S.W. 218; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737; *State v. Zeno*, 79 Minn. 80, 81 N.W. 748.

stitutional. Such was the case in a law prohibiting the granting of a certificate to aliens,¹ and one making two years' study as an apprentice under a qualified barber, or practice for a like period as a qualified barber a prerequisite to the granting of a certificate;² but a law was upheld which required applicants to pass an examination before receiving a certificate unless they had practiced as barbers for two years in the state prior to the making of their application, a total of two years without and within the state being held not to satisfy the provision.³

The statute of Texas on this subject⁴ was held to be unconstitutional⁵ both as violating the provision of the constitution of the state that exempts mechanical pursuits from an occupation tax, and as making discrimination between students working their way as barbers at the state university, barbers at the eleemosynary institutions of the state, and barbers in towns of less than one thousand population (all of whom are exempt from the application of the law), and all other barbers, who must procure certificates or forego practice.

The entire subject of examination and licensing, as is true of the whole subject of the regulation of the conditions of employment, is affected by the development of industry in its modern forms, and the corresponding growth of ideas of public policy. The contractor for work no longer does it himself, and neither fellow servants nor the employer are able to observe and guard against the negligent acts of unskillful workmen as may easily have been the case in days of small undertakings and intimate

¹ *Templar v. State Board*, 131 Mich. 254, 90 N.W. 1058.

² *State v. Walker*, 48 Wash. 8, 92 Pac. 775.

³ *Wass v. State Board*, 123 Mich. 544, 82 N.W. 234.

⁴ Acts 1907, ch. 141.

⁵ *Jackson v. State*, 55 Texas Cr. App. 557, 117 S.W. 818.

relationships between workmen and employer. The remark of the court in the Pennsylvania case relative to the compulsory employment of a certified mine foreman, that it is as if the state were saying, "You cannot be trusted to manage your own business; left to yourself, you will not properly care for your own employees,"¹ is more and more the attitude of the state, and is being approved by legislatures and courts alike as the necessary viewpoint in a time when great corporations and deputed directive agents are so largely in evidence in the conduct of industry. The law indicates to the individual a standard that has been fixed upon as the result of the collective experience of the many, with something of the inevitable bias of *ex parte* determination eliminated, and it cannot be questioned that the condition of both employer and employee is the better for such provisions. The fact remains that a just ground for intervention must appear, and that the rights of liberty and property may not be arbitrarily infringed upon under the guise of either health or safety regulations, or for the alleged prevention of fraud or oppression where the parties concerned are *sui juris* and on a reasonably equal footing.

A simple and clearly defensible law is one that forbids the employment on railway engines of illiterate engineers.² One state applies this rule to flagmen, hostlers, and assistant hostlers.³

SECTION 55. *Age as Condition of Employment.* — Among other conditions that may be embodied in statutes determining the fitness of employees for certain duties is that of age, as of

¹ *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237.

² Minn., R.L., sec. 4999; N.Y., C.L., ch. 40, sec. 1982; Wash., Acts 1909, ch. 249, sec. 274.

³ Ohio, Gen. Code, sec. 12,551.

telegraph operators,¹ elevator operators,² mine foremen,³ and the like. The reasons for such laws are for the most part different from those limiting the employment of young children, as the classes of persons covered are those whose acts and discretion involve the safety of others quite as much as their own welfare.⁴ The reasonableness of such regulations is apparent, coming within that of other provisions looking to the safety of workmen.⁵ The employer may make such rules of his own volition, and it has been held that an employee who misrepresents his age to evade the regulation is not entitled to recover damages if he is injured in the course of his employment, being no better than a trespasser.⁶ The better reason, however, rests with the view that the employer is relieved of liability only if the age is a cause of the injury;⁷ but while the employment continues, there is a relation of master and servant subsisting, and a corresponding liability for negligence toward such an employee, the contract being voidable but not void.⁸

A statute that prohibits the discharge of any person between the ages of eighteen and sixty solely on account of age⁹ may be mentioned in this connection.

SECTION 56. *Resident Laborers — Aliens.* — Laws that have

¹ Colo., A.S., sec. 1396a; N.Y., C.L., ch. 40, sec. 1982.

² Mass., Acts 1909, ch. 514, sec. 74.

³ Mont., Acts 1909, ch. 69; Mo., Acts 1903, p. 242.

⁴ *Moran v. Dickinson*, 204 Mass. 559, 90 N.E. 1150.

⁵ *Moran v. Dickinson*, *supra*.

⁶ *Norfolk & W. R. Co. v. Bondurant*, 107 Va. 515, 59 S.E. 1091.

⁷ *McDermott v. Iowa Falls, etc. R. Co.*, 47 N.W. 1037 (Iowa); *Lupher v. Atchison, T. & S. F. R. Co.*, 81 Kans. 585, 106 Pac. 284; *Denver & R. G. R. Co. v. Reiter*, 47 Colo. 417, 107 Pac. 1100.

⁸ *Lake Shore & M. S. R. Co. v. Baldwin*, 19 Ohio Cir. Ct. R. 338; *Lupher v. Atchison, T. & S. F. R. Co.*, *supra*; *Matlock v. Williamsville, etc., R. Co.*, 198 Mo. 495, 95 S.W. 849.

⁹ Colo., A.S., sec. 2801c2.

regard for the interests of local or resident labor are to be found in a number of states, particularly as regards public service. Belonging to this class are laws directing public printing to be done within the state.¹ Evidence of combination or great difference of cost gives officers a right to accept bids from outside the state, though in one case local printers are allowed a margin of fifteen per cent over outside competitors.² Of like purpose are laws directing a preference of domestic over foreign products as supplies for public use,³ and of resident laborers as employees on public works.⁴ This latter provision may be extended to a prohibition of the employment of aliens on such undertakings;⁵ or, more specifically, of Chinese or persons of Mongolian descent.⁶ The statute of Nevada goes so far as to declare the forfeiture of the charter of any railroad company or other corporation employing Chinese for the construction of any public works, while a provision of the constitution of California⁷ prohibited their employment by any corporation in any capacity.

In the construction by the courts of laws of this class, it has been held that the law of New York directing a preference of resident laborers is not binding on contractors on municipal undertakings;⁸ while the law of California prohibiting the employment of Chinese, enacted in accordance with the pro-

¹ Ala., Code, sec. 1657; Colo., Supp., sec. 804b; Ill., R.S., ch. 127, sec. 13; Tenn., Acts 1907, ch. 593.

² N. Dak., R.C., sec. 2282.

³ Cal., Acts 1897, ch. 149; N. Dak., R.C., sec. 1290; U.S., R.S., secs. 69, 1829.

⁴ Mass., Acts 1904, ch. 311; N.Y., Con. L., ch. 31, sec. 14; N. Mex., Acts 1905, ch. 124.

⁵ Cal., Polit. Code, sec. 2545, Sims' G.L., No. 127; Mass., *loc. cit.*; N.Y., *loc. cit.*; N.J., Acts 1899, ch. 202.

⁶ Cal., Const., art. 19, sec. 3; Mont., Acts 1903, ch. 114; U.S., 32 Stat. 389 (irrigation works only); Nev., C.L., secs. 5004-5006.

⁷ Art. 19, sec. 2.

⁸ *People v. Warren*, 13 Misc. 618, 34 N. Y. Supp. 942.

visions of the constitution above noted, were, with these provisions themselves, held to be unconstitutional and void, both as violating the provisions of the treaty with China and as conflicting with the fundamental law expressed in the fourteenth amendment to the federal Constitution;¹ so of a statute of Oregon prohibiting the employment of Chinese on public works;² and in general, laws discriminating against aliens or non-residents are not favored by the courts, since the fourteenth amendment is held to protect with its equality clause all persons in the United States, without regard to citizenship.³ Thus the law of Pennsylvania restricting employment on public works to citizens was held not to be a defense in an action by aliens to recover wages earned by them, though their employment was in violation of the act,⁴ and a New York statute directing the preference of citizens on municipal undertakings has already been mentioned as not binding on contractors; the same view was taken by the courts of Illinois with reference to a similar law.⁵ A law of New York⁶ which prohibited the use of stone on public works of the state except that dressed or worked within the state was held to be unconstitutional as an interference with interstate commerce. "The citizens of the state have the right to enter the markets of every other state to sell their products or to buy whatever they need, and all interference therewith by state legislation is void."⁷ Of a somewhat dif-

¹ *In re Parrott*, 1 Fed. 481, 6 Sawyer 349.

² *Baker v. Portland*, 5 Sawyer 566.

³ *Yick Wo v. Hopkins*, 118 U.S. 356, 6 Sup. Ct. 1064.

⁴ *Philadelphia v. McLinden*, 205 Pa. S. 172, 54 Atl. 719.

⁵ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N.E. 786.

⁶ Acts 1897, ch. 415, sec. 14.

⁷ *People v. Coler*, 166 N.Y. 144, 59 N.E. 776.

ferent nature, but falling under the ban of unconstitutionality like the rest, was a law of Michigan providing for the licensing of barbers, but withholding licenses from aliens,¹ the law being declared repugnant to the provisions of the fourteenth amendment.² Since neither in public employments nor in those regulated by the state can such discriminations be supported, *a fortiori*, they would fail in efforts to regulate purely private contracts.

There is, however, a law of this class which, being enacted by the Congress of the United States on a subject as to which it admittedly has authority to act, has been uniformly sustained and enforced, *i.e.*, the law prohibiting the importation of alien contract labor.³ State laws bearing on the subject in some aspects have been passed in a few cases. Thus a law of Delaware provides for contracts by state agents with laborers in foreign countries for importation for agricultural employment,⁴ while laws of Virginia⁵ and Wyoming⁶ declare that contracts with alien laborers shall be valid in those states for limited periods. A statute of Indiana prohibits the importation of aliens under contract.⁷ Inasmuch as the whole matter falls within the powers of Congress, all state legislation in conflict with federal laws is *pro tanto* void.

A law that favors local mechanics in a matter not involving the use of public funds is one requiring railroads operating in the state to maintain repair shops therein for the repair and

¹ Acts 1899, No. 212.

² *Templar v. Board*, 131 Mich. 254, 90 N.W. 1058.

³ 34 Stat. 898. Chinese Exclusion Case, 130 U.S. 581, 9 Sup. Ct. 623; *Lees v. U.S.*, 150 U.S. 476, 14 Sup. Ct. 163.

⁴ Acts 1907, ch. 116.

⁵ Code, secs. 44-48.

⁶ R.S., sec. 2520.

⁷ A.S., secs. 7079 *et seq.*

rebuilding of its rolling stock.¹ The validity of such laws, in view of the decisions above cited, is to say the least doubtful. Private employment is touched upon by other laws directed to the subject of alien labor, as one requiring employers of aliens to deduct the taxes due from such employees from their wages ;² and laws looking to the protection of the wages of aliens as a class of people ignorant of the language and customs of the country, and thus easily liable to imposition.³ A law that taxed the employers of alien laborers, allowing them to deduct the tax from the wages of such employees,⁴ was declared unconstitutional as violative of the guarantees of the fourteenth amendment, such a statute being a discrimination against the employment of aliens, whether the tax be deducted from their wages or paid by the employer himself.⁵

A construction of statutes that affects aliens adversely is that which deprives non-resident beneficiaries in some jurisdictions of the benefits of the so-called Lord Campbell's Act, or the statute which grants to the heirs or personal representatives of persons killed by the negligence of another a right of recovery against the responsible person. This is not strictly a labor law, but is of general application, and has gone far to ameliorate the condition of the surviving families of the victims of industrial accidents. Where the dependents of a deceased alien workman are non-residents, the courts of some states deny to them the benefits of this law on the ground that the legislature acts for

¹ La., Acts 1908, No. 296 ; Texas, Acts 1909, ch. 33.

² Pa., Acts 1897, ch. 108.

³ Conn., G.S., sec. 4607 ; Wyo., R.S., sec. 2521.

⁴ Pa., Acts 1897, No. 139.

⁵ *Frascr v. McConway & Torley Co.*, 82 Fed. 257 ; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 40 Atl. 977.

citizens, or at most for residents of the state, and that its powers do not extend beyond its borders; also that its own citizens employed abroad would not be afforded protection in like circumstances.¹ The more common, and certainly the more humane view, is that the negligent employer should be called upon to repair to some extent the injury caused by his negligence, and that the remedial nature of the statute was not intended to be restricted by the incident of the residence of the beneficiary.²

SECTION 57. *Convict Labor.* — An attempt to modify competition with local labor, and specifically with free labor, is made in many states³ by laws limiting the labor of convicts to the manufacture of supplies for the use of the state or to labor on public works and ways, or by requirements limiting the number of convicts that shall be employed in the manufacture of designated articles or classes of articles, or prohibiting the manufacture of certain kinds of goods altogether, by forbidding the use of any machinery in manufacture except such as is operated by hand or foot power, and by requiring that convict-made goods shall be so marked, or that dealers in them shall be specially licensed. Such laws are not, strictly speaking, labor laws, as they affect neither employer nor employee in their relations to each other, but are of an economic intent, seeking to modify the effects of the competition of convict with free labor. In so

¹ *Deni v. P.R. Co.*, 181 Pa. 525, 37 Atl. 558; *McMillan v. Spider Lake S. & L. Co.*, 115 Wis. 332, 91 N.W. 979.

² *Mulhall v. Fallon*, 176 Mass. 266, 57 N.E. 386; *Alfson v. Bush*, 182 N.Y. 393, 75 N.E. 230; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N.E. 94; *Low Moor Iron Co. v. Bianca's Adm'r.*, 106 Va. 83, 55 S.E. 532; *Renlund v. Mining Co.*, 89 Minn. 41, 93 N.W. 1057.

³ Ill., R.S., ch. 108; Minn., R.L., secs. 5446-5449; N.Y., Con. L., ch. 31, art. 13; Ohio, A.S., secs. 7388-85, 4400-1 to 4400-10; Mass., R.S., ch. 225, etc.

far as they relate only to the employment and management of convicts as laborers, the public has no grounds, as a rule, for intervening; but where the rights of citizens are affected, as by restrictions on the sale of goods purchased from prison manufactures, or made in prisons under contract, a question as to restrictions on commerce arises. This is particularly the case where the goods are transported outside the state of manufacture, and thus acquire a status as articles of interstate commerce, which is strictly and exclusively under the control of the federal government. It was on this basis that laws of New York ¹ and Ohio,² discriminating against goods of prison manufacture, were declared unconstitutional.³

¹ Acts 1894, ch. 698; Acts 1896, ch. 931.

² Acts 1894, p. 346.

³ *People v. Hawkins*, 85 Hun. 43, 32 N. Y. Supp. 524; same case, 157 N. Y. 1, 51 N. E. 257; *Arnold v. Yanders*, 56 Ohio St. 417, 47 N. E. 50.

CHAPTER VII

THE LIABILITY OF EMPLOYERS FOR INJURIES TO THEIR EMPLOYEES

SECTION 58. *What Law Controls.* — Although the English common law lies at the foundation of our doctrine of employers' liability, this doctrine is continually undergoing change, both by the rulings of state and federal courts and by the enactment of numerous statutes passed with a view to a more exact definition of the rights of the employee or to some amelioration of his condition in other respects. The principles of the common law are so differently interpreted in the various jurisdictions that state names are given to certain applications of them, indicative of a locally recognized view which is not in accord with the generally accepted construction of the law, while the statutes range in form and effect from a mere restatement of the common law to an abrogation of it in some more or less inclusive degree, and the enactment of rules varying considerably both from it and from the statutes of other states.

SECTION 59. *Duty of the Employer to Exercise Care.* — The two principal factors of the problem of liability are the duty of the employer to protect his employee in the discharge of the duties of his employment, and the assumption by the employee of the risks involved in the undertaking in which his contract of employment engages him. The duty of the employer is first

considered, but it will be found impossible to discuss it without constantly bearing in mind the modifications that result from the existence of the complementary obligations that rest upon the employee.

The briefest statement of the rule governing the employer is that he is required to use due care for the safety of his employees while they are engaged in the performance of their work. This is taken to include all reasonable means and precautions, the facts in each particular case being taken into consideration. If such provisions have been made as a reasonably prudent man would supply if he himself were exposed to the dangers of the servant's position, no negligence would appear. In the case of corporations the Supreme Court fixes the duty at the use of such caution and foresight as a corporation controlled by careful, prudent officers ought to exercise.¹

Though the courts of review have condemned any instructions that would tend to charge the employer with a higher degree of care than that which may be defined as ordinary, the measure is not an absolute one, but is proportioned to the dangers to which the employee is exposed. The ordinary incidents of railroading, mining, and certain classes of manufacturing are in themselves, in comparison with general employments, unusually dangerous; and so of a large railroad yard as compared with a smaller one, an express train as compared with a freight train, or a gaseous mine with one in which no such dangers exist. In such cases as these, or when temporarily abnormal conditions prevail, ordinary care is advanced far beyond the requirements of the less dangerous conditions. As stated by the Supreme Court in a consideration of this question,

¹ *Wabash R. Co. v. McDaniels*, 107 U.S. 454, 2 Sup. Ct. 932.

occupations, no matter how important, if necessarily dangerous, should be prosecuted only after the adoption of all reasonable precautions known to science. The necessary attendant danger should operate as a prohibition to the prosecution of such undertakings without such safeguards, and the neglect to provide all known and readily obtainable appliances will be regarded as a proof of culpable negligence.¹ On the other hand, care may lawfully be relaxed if the risk is unusually slight or if a device is for a specific and transitory use. The general rule as to care is qualified by the youthfulness or inexperience of an employee, a greater degree of care being commonly required for the protection of such persons; nor is the master relieved by the fact that a servant of tender years misrepresented his age in order to secure the employment.²

SECTION 60. *Place and Instrumentalities.* — In accordance with the rule as to due care, the obligation rests on the master to supply tools and appliances that are reasonably safe for the intended use and reasonably well adapted to perform the work in contemplation. These must be provided at the place of use, or at a place of such ease of access as to be reasonably procurable.

Closely related is the duty to provide a safe place to work and proper material for use, the measure still being not absolute, but reasonable or adequate safety. The distinction between place and appliance is not an easy one to draw, though the courts are stricter in their requirements as to the former than to the latter. Thus, if a scaffold furnished by an employer be regarded as a place to work, he is responsible not only for the materials sup-

¹ *Mather v. Rillston*, 156 U.S. 391, 15 Sup. Ct. 464.

² *Am. Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N.E. 766.

plied, but also for the construction and maintenance; while if it be viewed only as an appliance, he must make reasonable provision therefor; but its insufficiency, if such there be, may be laid to the account of the fellow workmen of an injured employee, or perhaps to his own negligence in erection.¹

The doctrine that the employer is bound to safeguard his employees from exposure to needless and unreasonable risks is subject to the general qualification that one has the right to carry on a business which is dangerous, either in itself or because of the manner in which it is conducted, provided it does not interfere with the rights of others, without incurring liability to a servant who is capable of contracting and who knows the dangers attendant on employment in the circumstances.² A brief statement of the rule is that the employer has a right to exercise a reasonable judgment and discretion in the conduct of his affairs, and it is said that it would be a very extraordinary case indeed in which this right would be interfered with.³ This does not, however, permit the use of unreasonably dangerous appliances nor those which are in themselves defective or so obsolete and inferior that their adoption or retention would of itself indicate negligence,⁴ though the question is held to be one not of comparative safety, but of reasonable safety. No fixed rule of liability is possible, therefore, in this respect, each case being of necessity decided on its own merits.

SECTION 61. *Standards of Care Fixed by Statute.* — Where a standard is fixed by statute, as for the safeguarding of the opera-

¹ *Butler v. Townsend*, 126 N.Y. 105, 26 N.E. 1017; *Hoveland v. National Blower Works*, 134 Wis. 342, 114 N.W. 795.

² *Tuttle v. Detroit, etc., Ry.*, 122 U.S. 189, 7 Sup. Ct. 1166.

³ *Tuttle v. Detroit, etc., Ry.*, *supra*.

⁴ *Choctaw, O. & G. R. Co. v. McDade*, 191 U.S. 64, 24 Sup. Ct. 24.

tions of mining, the provision and maintenance of fire escapes, of guards for dangerous machinery, or of safety couplers and other devices and appliances on railway trains, railroads, etc., the violation of such statutes resulting in the injury of any person entitled to be protected thereby is construed by the better authority to be an act of negligence, though it is sometimes held to be only evidence of negligence.¹ That the failure to comply with the statute is negligence would seem hardly to be disputable, since, as was said in the Mosgrove case cited above, "every person, while violating an express statute, is a wrongdoer, is *ex necessitate* negligent in the eyes of the law"; or, as an English judge phrased the same rule, "where an absolute duty is imposed on a person by statute, it is not necessary, in order to make him liable for breach of that duty, to show negligence."

In a number of cases, the laws making such requirements provide in terms that a failure to comply therewith makes an employer liable in damages for all injuries caused by such failure, which is but a declaration of the rule laid down in the quotations given above. In other cases the statute only provides a penalty for its violation, and does not in terms give an injured employee a right of action, though the injury may be traceable to the omission of the device prescribed by the law. The weight of authority gives a right of action in such cases.² According to the rule of common law that the employee does not assume

¹ Compare *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa 169, 81 N.W. 227; *Krause v. Morgan*, 53 Ohio St. 26, 40 N.E. 886; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U.S. 281, 28 Sup. Ct. 616, with *Pitcher v. New York, etc., R. Co.*, 127 N.Y. 678, 28 N.E. 136; *Jupiter Coal Min. Co. v. Mercer*, 84 Ill. App. 96.

² *Harrod v. Latham*, 77 Kans. 466, 95 Pac. 11; *Freeman v. Paper Mill Co.*, 61 Hun 125, 15 N.Y. Supp. 657; *Klatt v. Lumber Co.*, 97 Wis. 641, 73 N.W. 563.

the risk of his employer's negligence,¹ it would follow that in a suit for damages where a statute had been violated, the employer would be debarred from pleading that the employee had assumed the risk of the injury, and it has been so held,² though not uniformly.³ Here again statutes have been enacted in support of what appears to be the better rule, and the employer violating the statute cannot plead assumption of the risk by the injured employee.⁴ It has even been held that the negligent employer could not offer to prove that the employee was guilty of contributory negligence,⁵ and this doctrine too has been enacted into law in a few instances.⁶

Compliance with statutory regulation will not operate as a defense where the conditions are still so dangerous as to support a charge of negligence against the employer.⁷ On the same basis, it has been held, where the statute prescribes the condition in which a working place is to be maintained, that it is not sufficient that the employer has put the matter into the hands of a subordinate to attend to, but he must perform or have performed the specific thing required by the statute if the charge of negligence is to be avoided.⁸

¹ See sec. 72.

² *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N.E. 899; *Landgraf v. Kuh*, 188 Ill. 484, 59 N.E. 501; *Jones v. Caramel Co.*, 225 Pa. 644, 74 Atl. 613.

³ *Bodell v. Brazil Block-Coal Co.*, 25 Ind. App. 654, 58 N.E. 856; *Sutton v. Bakery Co.*, 135 Iowa 390, 112 N.W. 836; *Knisley v. Pratt*, 148 N.Y. 377, 42 N.E. 986.

⁴ Iowa, Acts 1907, ch. 181; Ohio, Gen. Code, sec. 6243; N.Y., Acts 1910, ch. 352; also provisions restricted in application to the statutes containing them, in many other states.

⁵ *Kellyville Coal Co. v. Strine*, 217 Ill. 516, 75 N.E. 375.

⁶ Ill., Acts 1905, p. 350, sec. 9; Miss., Code, sec. 4051; Mo., Acts 1907, pp. 181, 182.

⁷ *Chesapeake & O.R. Co. v. Rowsey's Adm'r.*, 108 Va. 632, 62 S.E. 363.

⁸ *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54.

SECTION 62. *Repair and Maintenance.* — The same care is required of the master in maintaining as in furnishing safe and suitable appliances.¹ Inasmuch, however, as the progress of work and the use of tools produce constantly changing conditions, the doctrine that reasonably safe places and appliances must be provided is frequently modified by the statement that the duty has been discharged when ordinary or reasonable care has been exercised in the effort to make such provision.² The continued employment of tools that are so worn as to increase the danger of their use will in general entail liability on the employer. If, however, the danger is an obvious one, the employee, continuing to work with a knowledge of the danger and without complaint, will be considered to have assumed the risk, and in case of injury has no recovery; nor will liability attach until the employer has or reasonably could have information of the defect requiring repair.

An important decision by the Supreme Court puts at rest a question on which opinions differed, *i.e.*, as to the standard of care to be exercised in cases where a statutory duty was prescribed. It had been held that the common law rule was not superseded by the federal statute providing for the equipment and maintenance of safety couplers on railroad cars, the court ruling that the use of reasonable and ordinary care and diligence relieved the employer,³ while in another case in which the same law was under consideration, it was ruled that the duty of keeping the appliances in order was an absolute one,⁴ a view that was

¹ Moore v. Wabash, St. L. & P. R. Co., 85 Mo. 588.

² Anderson v. Michigan C. R. Co., 107 Mich. 591, 65 N.W. 585; Reed v. Stockmyer, 20 C. C. A. 381, 74 Fed. 186.

³ Missouri P. R. Co. v. Brinkmeier, 77 Kans. 14, 93 Pac. 621.

⁴ Delk v. R. Co. See St. Louis, etc., R. Co. v. Delk, 158 Fed. 931, 934 (C. C. A.).

rejected by the appellate court. A similar case reached the Supreme Court, where it was held that the duty was an absolute one, and that deviation from the standard was negligence, the rule of "reasonable care" having been abrogated by the statutory requirement as to adjustment and repair.¹

SECTION 63. *Customary Method or Use.* — The employer is not liable to an employee for an injury incurred by a departure from the customary method of performing work or by leaving the place of his employment to work in some other department unless on instructions from a properly authorized representative.² So if a more dangerous method or place of work is chosen when one less dangerous was available, the resultant injury, if any, does not charge the employer with liability.³ The same rule applies where an instrumentality is put to a different use by the employee from that for which it was intended, with a resultant injury to himself.⁴

SECTION 64. *Inspection.* — The duty of making repairs necessarily involves the duty of discovering the need for them as it may arise, which entails the duty of inspection. The inspection required for maintenance differs somewhat from that necessary or presumed at the time a new plant or new tools are first brought into use. As to the latter, it may first be stated that an employer who makes and supplies an instrumentality is chargeable with such a knowledge of its defects as ordinary care during the course of such manufacture would have disclosed. In case of purchase, the duty of inspection may ordinarily be assumed to have been discharged by the manufacturer, though a showing

¹ St. Louis, I. M. & S. R. Co. v. Taylor, 210 U.S. 281, 28 Sup. Ct. 616.

² Stagg v. Edward Western Tea & Spice Co., 169 Mo. 489, 69 S.W. 391.

³ Wormell v. Maine C. R. Co., 79 Me. 397, 10 Atl. 49.

⁴ McKay v. Hand, 168 Mass. 270, 47 N.E. 104.

that the purchase was carelessly made (as, for instance, without indicating to the manufacturer the intended use, so that he might make tests appropriate to such use) has been held to imply negligence. If an article is of an approved pattern, and the dealer is a reputable one, the presumption is in favor of the employer's non-liability.¹ The doctrine does not control everywhere, however, cases being found in which it was held to be the duty of the employer to cause a thorough inspection of newly purchased articles before putting them into use.² In favor of this view is the fact that it accords with the doctrine of non-delegable duties, discussed below, and that it alone affords protection to the employee where there has been actual negligence on the part of the manufacturer, with whom he has no contractual relations.

The necessity for inspection of instrumentalities in use obviously varies with the nature of the appliance and the circumstances of employment. Small and simple tools may be used without inspection, the employer being entitled to assume that the workmen will make timely discovery of defects and be suitable judges of the fitness of such tools for use. Complex or dangerous machinery or instrumentalities that are liable to rapid wear or deterioration must, on the other hand, be the subjects of inspections of a nature and frequency adapted to the conditions indicated.

The duty does not extend beyond a reasonably careful inspection, though no defect will be considered latent which may be discovered by the exercise of due care. The taking apart of ma-

¹ *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501, 47 N.E. 406. But see *Erickson v. Am. Steel & W. Co.*, 193 Mass. 119, 78 N.E. 761.

² *Morton v. Detroit, etc., R. Co.*, 81 Mich. 423, 46 N.W. 111; *Richmond & D. R. Co. v. Elliott*, 149 U.S. 266, 13 Sup. Ct. 837.

chinery, or such other inspection as would interfere with the profitable conduct of business, is not, in general, required.¹ External appearances, however, may be such as to demand a more thorough inspection;² so, also, of appliances showing defects in operation or those to which some accident has occurred of a nature likely to cause obscure injuries to machinery, which may subsequently give rise to accidents.³

In many states coal mines, factories, stationary steam boilers, and in some, locomotive boilers and railroad equipment, are subjects of inspection at the hands of officials appointed by the state.⁴ Although some of these requirements have regard to the safety of the public as well as to that of the employees, they are valuable as fixing standards which must be observed, and non-compliance with an inspector's orders is negligence if an employee is injured by reason thereof.⁵ According to the better view, assumption of risks cannot be pleaded as a defense, since the employee has a right to presume that his employer has performed his prescribed duty.⁶ Failure to comply with an inspector's orders is a penal offense in Idaho.⁷

The fact that government inspections have been made does not, however, excuse the employer for negligence in this regard;⁸ nor does the fact that the employment of a certified overseer or mine boss is required by statute serve to clear the employer of

¹ *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. 301, 13 Atl. 286.

² *Hall v. Emerson-Stevens Mfg. Co.*, 94 Me. 445, 47 Atl. 924.

³ *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 28 N.E. 352.

⁴ See Chapter 4.

⁵ *Andricus' Adm'r. v. Coal Co.*, 28 Ky. 704, 90 S.W. 233.

⁶ *Foley v. Pioneer Mining, etc., Co.*, 144 Ala. 178, 40 So. 273.

⁷ Code, sec. 4761.

⁸ *O'Connor v. Armour Packing Co.*, 158 Fed. 241 (C.C.A.). See N.Y., C.L., ch. 49, sec. 73.

responsibility for his negligent conduct.¹ The reverse has been held, however,² though it cannot be regarded as other than an erroneous view of the law, and it may be precluded by a declaration embodied in the statute to the effect that the certified employee is to be regarded as the personal representative of the employer.³

SECTION 65. *Ownership of Appliances.* — The duty of inspection above considered assumes the ownership of both appliances and premises to be in the employer. Where ownership is divided various distinctions exist, based on the relations of the employer and the owner of the premises or instrumentality. The most important of this class of cases are perhaps those in which is involved the handling by railroad companies of cars belonging to other companies. Such cars, known in railroading as "foreign" cars, although received only temporarily for purposes of transportation, are as completely identified with the employer's plant as if the transfer was made by purchase, so that the nature of the obligations arising therefrom differs from that existing in cases where the employer's lack of control over the appliance is usually held to exempt him from liability.⁴

In the first place, it may be said that no railway company is obliged to receive and turn over to be handled by its employees any defective or dangerous car.⁵ Every company is under a legal duty not to expose its employees to dangers arising from

¹ *Consol. Coal Co. v. Seniger*, 179 Ill. 370, 53 N. E. 733; *Fulton v. Wilmington Star Min. Co.*, 133 Fed. 193 (C.C.A.); *Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N.E. 76.

² *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237; *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S.E. 107.

³ *Tenn.*, Acts 1907, ch. 540.

⁴ *Baltimore & P. R. Co. v. Mackey*, 157 U.S. 72, 15 Sup. Ct. 491.

⁵ *Gottlieb v. R. Co.*, 100 N.Y. 462, 3 N.E. 344.

such defects of foreign cars as may be discovered by reasonable inspection before such cars are received into its train. This inspection is such a one as the company's own cars would receive while in use, and not a shop inspection. The shortness of the time during which the foreign car is in the hands of a company is not an excuse for neglecting the duty.¹

Where danger from the use of foreign cars arises, not from defective equipments, but from differences of construction, it has been generally held that the servant assumes the obvious risks thus arising, but if he is ignorant of the risk, a right of action accrues. It may be noted, however, that the statutory requirement as to automatic couplers is not met unless the various kinds brought together will actually couple by impact, the mere fact that they will so couple when used with others of the same make not being a sufficient compliance with the federal statute.²

SECTION 66. *Working Force.* — Besides the duty to use care in regard to instrumentalities, the employer must also be reasonably and properly careful and diligent to see that each employee hired by him has such qualifications as will enable him to perform his duties without greater risk to himself and his co-employees than the nature of the business involves; and that a sufficient number is provided for a reasonably safe performance of the work.

The disqualifications of persons of suitable age may be mental, moral, or physical, the most common being those that arise from the intemperate use of intoxicants, though habitual carelessness or recklessness, such as may reasonably come to the

¹ Atchison, T. & S. F. R. Co. v. Penfold, 57 Kans. 148, 45 Pac. 574.

² Johnson v. Southern P. R. Co., 196 U.S. 1, 25 Sup. Ct. 158.

knowledge of the employer, likewise charges him with liability. The element of knowledge, either actual or constructive, is an essential one. A plaintiff grounding his claim on the negligence of the employer in hiring an incompetent coservant must prove, not only the incompetence, but also that the employer failed of proper care and diligence in the original hiring or in subsequent inquiry as to incompetency of which notice was given during the term of service.¹

SECTION 67. *Rules.* — Another branch of the employer's duty is that of providing appropriate rules and securing the carrying out of a suitable system for the conduct of his work. This applies only to business sufficiently complex to make such arrangements reasonable, and no such assumption is made as that rules can be so framed as to guard against every contingency. Such rules and practices as are prescribed must be brought to the knowledge of the employee before he is considered to be bound by them, but it may be inferred from circumstances that this has been done. Express contracts with reference to the conditions of employment as affected by specified rules are conclusive as against an employee professing ignorance of such rules;² but a mere agreement, though in writing, to study the rules and keep posted on them is applicable only to such rules as have been duly promulgated or which the employer has definitely undertaken to bring to the employee's knowledge.³

Enforcement of rules is no less a duty than the promulgation of rules in so far as a reasonably careful supervision will accomplish it. Repeated and notorious violations will charge the

¹ *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 10 N.E. 631.

² *Sedgwick v. Illinois C. R. Co.*, 73 Iowa 158, 34 N.W. 790.

³ *Carroll v. East Tennessee, V. & G. R. Co.*, 82 Ga. 452, 10 S.E. 163.

employer with a knowledge of the insufficiency of the provisions made and the necessity of new regulations or of additional superintendence. In the absence of steps to secure the enforcement of rules thus violated, it has been frequently held that the master has sanctioned their abrogation and that they are no longer binding. Their violation would not then be regarded as negligence, nor could the employer offer such rules as a defense.¹

In a few jurisdictions the adoption and promulgation of rules for railroad employees are the subject of statutory requirement; ² while in some, at least partial codes of mine rules have been enacted.³

SECTION 68. *Instructions and Warnings.* — Besides the general rules by which the conduct of business is determined, instructions may be necessary in case either of abnormal conditions or of the employment of inexperienced persons. The principle lying at the foundation of this duty is the same as in the case of providing appliances, viz., liability does not attach on account of the dangers of the situation, but for placing the employee in a situation of the hazards of which he is excusably ignorant. There is no legal necessity for the giving of instructions or warnings, therefore, where the employee's knowledge as to conditions and means of safety is equal to that of the employer, nor where, all the circumstances being considered, adequate knowledge can be attributed to him. A modification of this rule is to be found, however, in the fact that it is not a mere knowledge of conditions, but a comprehension of the dangers attendant thereon, that must be shown in order to ab-

¹ St. Louis, A. & T. R. Co. v. Triplett, 54 Ark. 289, 15 S.W. 831; 16 S.W. 266.

² Ind., Acts 1907, ch. 272; Mich., C.L., sec. 6286.

³ Ariz., Acts 1907, ch. 72; Ill., R.C. ch. 93; Md., Acts 1902, ch. 124; Pa., B.P. Dig. pp. 1340 *et seq.* ⁴

solve the master from responsibility.¹ Misrepresentations on the part of the employee as to age and experience have been held by some courts to relieve the master of the duty to instruct,² while others deny such effect.³ Regarding the duty as one of "proper care," it would seem that the employer cannot be absolved from the duty of disclosing dangers which are not obvious by any statements whatever of those whom he may employ, though the circumstance of the employee's representations may be considered.

SECTION 69. *Duties Non-Delegable*. — Considering the employer's duties as matter of personal obligation, it is apparent that directions to a servant, or the employment of persons to perform these functions in the employer's stead, will not in itself relieve him of the responsibility; but if there be a defective discharge of such duties by the person employed for their performance, the employer is still liable, and will not be allowed to screen himself behind his agent. In determining the question of the employer's liability, the relations of fellow-servants are involved, or rather the doctrine of vice-principals, and the decision will be found to turn largely on the point of whether the negligent employee was, with reference to the act occasioning the injury, a co-employee, or whether he was the representative of the employer in that particular act.

As to duties prescribed by statute, it appears to be the rule that, apart from an express legislative declaration, they will be classed as delegable or non-delegable according to the common-law classification of such duties.

¹ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 3 Am. Rep. 506.

² *Steen v. St. Paul & D. R. Co.*, 37 Minn. 310, 34 N.W. 113.

³ *Louisville & N. R. Co. v. Miller*, 43 C.C.A. 436, 104 Fed. 124.

SECTION 70. *Negligence.* — The non-performance of the duties devolving upon the employer, when it results in injury to an employee, renders him liable to a charge of negligence. This is defined as being "the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done."¹ It is not necessary that the particular injury could have been foreseen, or the particular manner of its occurrence anticipated, but only that the person charged might reasonably have foreseen that injurious consequences might be expected from his act or omission.² The negligent act will be judged by the exigencies of the occasion. The mere fact of injury is not proof of negligence; in fact, it is said that it does not even carry a presumption of negligence.³ The matter is therefore one requiring direct proof, unless the conditions are so obviously dangerous as to preclude any other inference than that of negligence.⁴ The burden of proof is therefore generally held to be on the plaintiff, though it has been held that such an accident as a collision or the derailment of a train raised such a presumption of negligence that the burden was cast on the railroad company of proving that it was not negligent.⁵ This is in brief the effect of a statute of Mississippi applicable to railroads.⁶

SECTION 71. *The Defenses of Employers.* — For a breach of duty to an employee resulting in injury an action will lie for the recovery of damages. Employers are not insurers, however,

¹ *Baltimore & P. R. Co. v. Jones*, 95 U.S. 439.

² *Mobile, J. & K.C. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360.

³ *Patton v. Texas P. R. Co.*, 179 U.S. 658, 21 Sup. Ct. 275.

⁴ *Stearns v. Ontario Spinning Co.*, 184 Pa. 523, 39 Atl. 292.

⁵ *Wright v. Southern R. Co.*, 127 N.C. 225, 37 S.E. 221. See also *Shuler v. Omaha, K. C. & E. R. Co.*, 87 Mo. App. 618.

⁶ Code, sec. 1985.

and are liable for the consequences, not of danger, but of negligence. Some duties are by statute made obligatory upon the employer to such an extent as practically to fix his liability in case of injuries entailed by their omission. Apart from such enactments, however, the employer may, in case of an action for damages, offer a defense based on the principle expressed in the maxim, "*Volenti non fit injuria*"; or he may undertake to prove the plaintiff's assumption of the risk, or his contributory negligence; or he may rely on the doctrine of common employment to relieve him from liability.¹

The principle of the maxim, "*Volenti non fit injuria*," is of general application, the meaning of the phrase as freely rendered being, "That to which a person assents is not esteemed in law an injury." A clearer statement is that by an English judge, "One who has invited or assented to an act being done toward him cannot, when he suffers from it, complain of it as a wrong." In a Massachusetts case the doctrine was thus expressed: "One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure." In brief, the injured person has assumed the risk; and, apart from the contractual relation of employer and employee, there is a considerable class of cases in which this defense to an action for damages may be interposed. The invitation or assent is not necessarily or even commonly formal, but is inferable from conduct and conditions, often subsequent to the entrance upon the situation that gives rise to the circumstances to which the doctrine is applied.

¹ Mention has already been made of the statutory abrogation of these defenses under specified conditions. See sec. 46.

SECTION 72. *Assumption of Risks.* — When a contract of employment is entered upon, the law imports into the agreement an assumption by the employee of the ordinary risks incident to the employment, and of such other risks as may be known and appreciated by him. This is said to be one of the terms of the contract, express or implied from the circumstances of the employment.¹ One seeking employment impliedly represents that he is capable therefor, and that he comprehends the ordinary risks.² Another view of the defence is that it does not arise from the contract of employment, but from the status of employer and employee as fixed by common law, and is over and above the contract, being imposed by law upon the parties thereto, regardless of their desires.³ Courts differ as to whether or not the employee assumes the risks of his employer's negligence, some holding that he does if such negligence is known; ⁴ though this may be qualified by limiting the assumption to cases other than those in which the negligence consists in a failure to comply with statutory requirements for the employee's safety.⁵ Even this exception has been specifically disallowed, however,⁶ while on the other hand it has been broadly held that the employee never assumes the risk of the employer's negligence.⁷ "Prima facie, a servant does not assume any

¹ *Narramore v. Cleveland, etc., R. Co.*, 96 Fed. 298, 37 C.C.A. 499.

² *Wagner v. Chemical Co.*, 147 Pa. 475, 23 Atl. 772.

³ *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247; *Martin v. Chicago, etc., R. Co.*, 118 Iowa 148, 91 N.W. 1034.

⁴ *Consol. Min. Co. v. Bateman*, 176 Fed. 57 (C.C.A.); *Labatt, M. & S.*, sec. 271, cases cited.

⁵ *Ft. Wayne, etc., Traction Co. v. Roudebush*, 173 Ind. 57, 88 N.E. 676.

⁶ *Knisley v. Pratt*, 148 N.Y. 377, 42 N.E. 986.

⁷ *Gagnon v. Machine Co.*, 174 Fed. 477; *George v. Railway Co.*, 225 Mo. 364, 125 S.W. 196; see also *Hough v. Texas & P. R. Co.*, 100 U.S. 213, 25 L. Ed. 612; *George v. Clark*, 85 Fed. 608, 29 C.C.A. 374.

risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incident to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties."¹ It is doubtless too much to say, in view of the rather numerous exceptions to the rule, that the employee never assumes such risks, though obviously the whole doctrine of the liability of the employer for injuries to his employees turns on the point involved.

The question of the employee's knowledge and understanding is in general controlling in the matter of ordinary risks, and, where the exception is allowed, in the matter of extraordinary risks as well. The knowledge may be either actual or imputed. A workman of mature years and ordinary intelligence, offering himself for employment, is presumed to know and appreciate the conditions, and to assume the risks ordinarily incident to the service and to have notice of all risks which, to one of his experience and capacity, are, or ought to be, open and obvious. He does not assume risks arising from conditions of which he was actually and excusably ignorant; nor is he required to use more than ordinary care to discover existing conditions.²

The courts have sometimes defined ordinary risks as those that pertain to the employment after the employer has discharged his duty as to safe place, appliances, etc., and which ordinary care on his part cannot guard against. Under another conception the word "ordinary" is held to be construed in its usual sense. This may be taken to mean either that the risk is

¹ Labatt, M. & S., secs. 2, 270.

² *Allen v. Boston & M. R. Co.*, 69 N.H. 271, 39 Atl. 978; *Comben v. Belleville Stone Co.*, 59 N.J.L. 226, 36 Atl. 473.

so obviously a normal incident of the employment that an intelligent observer would recognize it as such, and the dangers arising therefrom as constantly possible; or it may imply that the employment unavoidably and of necessity involves the risks, which is much the same as holding that the master's care cannot obviate them.

These risks are such as arise from the negligence of fellow servants, unless the employer was negligent in employing incompetent workmen; or from the nature of the instrumentalities used; or from the conditions, whether permanent or temporary, of the conduct and nature of the business.

Risks which may be obviated by the exercise of reasonable care on the part of the employer are classed as extraordinary, and these the employee is held not to have assumed without a knowledge and comprehension of the dangers arising from the employer's negligence. If the dangers are patent or are brought to the knowledge of an employee, his entering upon or remaining in service is construed as a waiver of any claim against the employer for resulting damages.¹ In the first case he will be held to have made his contract in the light of existing conditions; and as to risks arising during employment, it has been said that if a servant continues to use an appliance which he knows to be dangerous, he does so at his own risk and not at that of his employer.² It must appear, however, that the risk was actually appreciated. While a failure to notify the employer of discovered or known risks is construed as indicating the employee's willingness to continue to work while they exist, the risk is not thrown upon the employer by a mere notification not replied to

¹ *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U.S. 189, 7 Sup. Ct. 1160.

² *Washington & G. R. Co. v. McDade*, 135 U.S. 554, 10 Sup. Ct. 1044.

by his promise to repair.¹ If the alternative of continuing to work with the defective appliance or of leaving the employment is offered, and the employee continues to work, he will be held to have assumed the risk.² A promise to repair can be relied upon only for a reasonable time, after which the risk will be upon the employee.

SECTION 73. *Contracts and Rules avoiding Liability.*—To what extent the defense of assumption of risks may be carried is a question for the courts, and efforts on the part of the employer to make his workmen insurers of their own safety by the adoption of rules or the requirement of contracts releasing the employer from liability will in general be discountenanced. Thus it has been held that a rule which required an employee not to attempt to use appliances unless he knew that they were in a proper condition imposed upon the servant one of the duties of the master, *i.e.*, that of seeing that the implements furnished are in a reasonably safe state of repair; and such rule was declared void.³ Nor can an employer by his rules shift to the employee the responsibility placed upon himself by a statute.⁴ A stipulation exempting a railroad company from liability for injuries caused to its employees by its negligence is void as against public policy.⁵ A contract executed subsequent to the

¹ East Tennessee, V. & G. R. Co. v. Duffield, 12 Lea 63, 47 Am. Rep. 319.

² Leary v. Boston & A. R. Co., 139 Mass. 580, 2 N.E. 115. But see Jewell v. Bolt & Nut Co., 231 Mo. 176, 132 S. W. 703.

³ Missouri, K. & T. R. Co. v. Wood, 35 S.W. 879 (Tex. Civ. App.).

⁴ Consol. Coal Co. v. Lundak, 196 Ill. 594, 63 N.E. 1079.

⁵ Lake Shore & M. S. R. Co. v. Spangler, 44 Ohio St. 471, 8 N.E. 467; Little Rock, etc., R. Co. v. Eubanks, 48 Ark. 460, 3 S.W. 808; Richmond & D. R. Co. v. Jones, 92 Ala. 218, 9 So. 276; Stone's Adm'r. v. Union P. R. Co., 32 Utah 185, 89 Pac. 715; Johnson v. Charleston & S. R. Co., 55 S.C. 152, 32 S.E. 2; Roesner v. Herman, 8 Fed. 782.

employee's entrance on service, relieving the employer of liability, has been held void for want of consideration.¹ In another case, in a lower court of the same state as the above, a contract of like import, though based on sufficient consideration, was declared void as against public policy.² As was said in the Roesner case, if there was no negligence, there was no need of a contract to exempt the defendant from liability; if he was negligent, the contract would be of no avail.

It has been held that an employer could not relieve himself by contract of a liability imposed by statute, although the statute itself made no reference to such contracts.³ An implied waiver of the benefits of a statute which requires frogs on a railroad to be blocked or dangerous machinery to be guarded, based on continuance in service with knowledge that the law has not been complied with, has been held not to be valid as a defense in an action for injuries resulting from the employer's failure to comply with the statute.⁴ There is, however, a strong list of cases on the other side.⁵ In Georgia⁶ and Pennsylvania,⁷ express contracts limiting or denying the employee's right of action have been upheld. In the former state a later statute declares such contracts void in so far as they affect any liability

¹ *Purdy v. Rome, etc., R. Co.*, 125 N.Y. 209, 26 N.E. 255.

² *Runt v. Herring*, 49 N.Y. St. 126, 21 N.Y. Supp. 241.

³ *Kansas P. R. Co. v. Peavey*, 29 Kans. 169, 44 Am. Rep. 630; *Tarbell v. Rutland R. Co.*, 73 Vt. 347, 51 Atl. 6.

⁴ *Narramore v. Cleveland, etc., R. Co.*, 96 Fed. 298, 37, C.C.A. 499; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N.E. 492; *Western Furniture & Mfg. Co. v. Bloom*, 76 Kans. 127, 90 Pac. 821.

⁵ *Denver & R. G. R. Co. v. Gannon*, 40 Colo. 195, 90 Pac. 853; *St. Louis Cordage Co. v. Miller*, 126 Fed. 495; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N.E. 1119.

⁶ *Western & A. R. Co. v. Bishop*, 50 Ga. 465.

⁷ *Mitchell v. Pa. R. Co.*, 1 Am. Law Reg. 717.

fixed by statute. Similar or more general statutes exist in a majority of the states, and such a provision is incorporated in the federal liability law of 1908. These laws have received countenance in a number of cases.¹ In the Indiana and Iowa cases cited, it was necessary to decide on the constitutionality of this particular provision of the state statutes. In the Mumford case the clause prohibiting contracts limiting liability was held applicable to a provision in a contract of employment limiting the time within which actions to recover damages for injuries might be brought, the provision being condemned as contrary to law. In the Quinn case it was held that the statute was not contravened by an agreement in the contract of employment by which the employee undertook to make a careful examination of the place of work so that he might understand its dangers.

SECTION 74. *Relief Benefits.* — Where the feature of relief benefits exists, a new factor is introduced, and, apart from statutes declaring a contrary doctrine, the rulings of the courts are quite uniform in favor of the contract. It is generally provided that the acceptance of benefits by the injured employee shall operate as a waiver of his right of action at law against his employer, and that if action is brought and is compromised or carried to judgment, no claim shall lie against the fund. Such funds are usually maintained jointly by employers and employees, though the expense is not necessarily equally shared.

¹ *Quinn v. New York, etc., R. Co.*, 175 Mass. 150, 55 N.E. 891; *Pierce v. Van Dusen*, 78 Fed. 693; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U.S. 210, 8 Sup. Ct. 1176; *Pittsburg, etc., R. Co. v. Montgomery*, 152 Ind. 1, 49 N.E. 582; *Powell v. Sherwood*, 162 Mo. 605, 63 S.W. 485; *Mumford v. Chicago, etc., R. Co.*, 128 Iowa 685, 104 N.W. 1135; *Kansas P. R. Co. v. Peavey, supra.* *Per contra*, see *Shaver v. Pennsylvania Co.*, 71 Fed. 931.

An agreement to accept benefits, the acceptance to operate as a waiver of the right of action, is not regarded as contrary to public policy, inasmuch as it is not the making of the agreement prior to the injury, which would not in itself be effective, but the acceptance of benefits after the receipt of the injury, that bars the action.¹ The contract merely requires the employee to make his election whether to apply to the relief department or to sue.² But if there is lack of mutuality, or the defendant company fails to show that it assumes a fair proportion of the burden of paying the benefits, even the acceptance of such benefits will not bar a suit for damages.³ Nor will a partial payment of the agreed benefits avail as a bar to the action.⁴ The state has the right to promote the welfare and safety of those within its jurisdiction by requiring all corporations and persons to be responsible for their negligence to the full measure of the loss caused thereby, a contract to the contrary notwithstanding.⁵ A contract that purports to bind the members of the relief department by the decision of an "advisory committee," making such decision final and decisive, is void, as it undertakes to defeat the constitutional right of appeal to the courts for the redress of wrong.⁶

The agreement that claims on the benefit fund are forfeited by suit in which judgment is procured or a compromise is made

¹ *Johnson v. Philadelphia, etc., R. Co.*, 193 Pa. St. 134, 29 Atl. 854; *Frank v. Newport Min. Co.*, 148 Mich. 637, 112 N.W. 504.

² *Owens v. Baltimore & O. R. Co.*, 35 Fed. 715; *Leas v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N.E. 423.

³ *Chicago, B. & Q. R. Co. v. Miller*, 76 Fed. 439 (C.C.A.); *Atlantic C. L. R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761.

⁴ *Pennsylvania Co. v. Chapman*, 220 Ill. 428, 77 N.E. 248.

⁵ *Chicago, M. & St. P. R. Co. v. Solan*, 169 U.S. 133, 18 Sup. Ct. 289.

⁶ *Baltimore, etc., R. Co. v. Stankard*, 56 Ohio St. 224, 46 N.E. 577.

was held valid in an Iowa case;¹ but the supreme court of New Jersey ruled that "the judgment intended is one by which the claimant recovers some compensation for the loss alleged," and granted a new trial in a suit to recover the benefit where a suit for damages at law had recovered nothing.² Double recovery will not generally be allowed, the provision of such contracts that the prosecution of a suit bars the claim to the fund fixing the status of the claimant thereunder.³ This question has been made the subject of legislation, however, and a statute providing that the acceptance of insurance, relief, or benefits from an association of the nature under consideration shall not be a bar to an action to damages⁴ has been held constitutional,⁵ and the fact cannot be ignored that in accepting such benefits the employee feels that he is only taking that to which he is entitled by reason of his contributions to the fund without being required to forfeit his right to recover damages at law; and it is within the power of the legislature to declare that the payment of such benefits shall not operate to discharge an employer from liability for his negligence and shift the burden which the state has declared he should be compelled to bear.⁶ A statute of South Carolina goes a step farther, and requires railroad companies to pay the agreed benefit on the death of an employee from accident, with the provision that the acceptance of such benefit shall not be a bar to action.⁷ This statute has been de-

¹ *Donald v. Chicago, etc., R. Co.* 93 Iowa 284, 61 N.W. 971.

² *O'Reilly v. Pennsylvania Co.*, 69 N.J.L. 119, 54 Atl. 233.

³ *Baltimore & O. R. Co. v. Ray*, 36 Ind. App. 430, 73 N.E. 942.

⁴ Iowa, Code, sec. 2071.

⁵ *McGuire v. Chicago, etc., R. Co.*, 131 Iowa 340, 108 N.W. 902; *Chicago, etc., R. Co. v. McGuire*, 219 U.S. 549, 31 Sup. Ct. 259.

⁶ *Chicago, etc., R. Co. v. McGuire, supra.*

⁷ Acts 1903, No. 48.

clared valid,¹ but it was held that an employee recovering damages as full compensation for injuries could not afterwards disregard his relinquishment of his interest in the benefit fund and seek to secure such interest in an action at law. In such a case the statute was held not to apply, and the agreement made by the employee was held to control.

The federal liability laws of 1906² and 1908³ contain provisions forbidding contracts of waiver, but contributions made by employers to benefit or relief societies may be set off against any judgment for damages secured by an injured employee. This provision of the act of 1906 was held to be valid and to give an injured employee a right to sue for damages in spite of the fact that he had received benefits from a society of which he was a member, one of the conditions being that the receipt of such benefits should bar his right to sue.⁴

While express messengers may at common law waive their right of action for damages in case of injury against both their employer and the transporting railway company, such a contract has been held to be void as against the railroad company under the Iowa statute above mentioned.⁵

SECTION 75. *Contributory Negligence.* — When a risk involves such a degree of danger that a prudent man would not assume it, the defense to an action by an injured employee is not that the plaintiff by his contract assumed the risk, but that he was, by his conduct, guilty of contributory negligence. In practice,

¹ *Sturgiss v. Atlantic C.L.R. Co.*, 80 S.C. 167, 60 S.E. 939.

² Acts 1905-1906, ch. 3073, 34 Stat. 232.

³ Acts 1907-1908, ch. 149, 35 Stat. 65.

⁴ *Goldenstein v. Baltimore & O. R. Co.*, 37 Wash. L. Rep. 2; *Potter v. Same* 37 Wash. L. Rep. 466.

⁵ *O'Brien v. Chicago N. W. R. Co.*, 116 Fed. 502.

the line is not clearly drawn between the two defenses, nor is it always easy to do so, inasmuch as the facts in a given case may support either defense. The principles are distinct, however, as assumption of risk is an implied or actual agreement, entered into before the happening of the accident, to waive compensation from the employer for injuries resulting therefrom; or, it is an incident of the contract, read into it by the fixed rules of law. If, however, there has been contributory negligence, there is no reference to either contract or status to determine rights, but only to the conduct of the employee. If under all the attendant circumstances he fell short of reasonable and ordinary care, the defense of contributory negligence will lie against him.

The rule is announced by Cooley as follows: "If the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof."

The negligence of an employee will not be a bar to his action unless it is the actual and proximate cause of his injury. Conduct merely furnishing the occasion or condition of the injury does not amount to negligence.¹ Even if the employee was guilty of negligence which may have contributed to the accident, yet if the employer by the exercise of ordinary care and diligence could have avoided its occurrence, the antecedent negligence of the employee has been held not to destroy his right of action. Still less will the negligence of the servant operate as a defense where it is followed by willful or wanton negligence on the part

¹ *Smithwick v. Hall & U. Co.*, 59 Conn. 261, 21 Atl. 924.

of the master. Where injuries result in death, the right of the personal representative to sue, which does not exist under the common law, but is now given by statute in most states, is subject to the same limitations as would have been the right of the injured person if he had survived.

SECTION 76. *What Negligence bars Recovery.* — What does and what does not constitute such negligence as to be a bar to an employee's claim for damages have not been consistently ruled upon by the courts. The test varies according to circumstances, the rule being that the servant must conduct himself as a prudent person would in a like position.

A servant engaging in work for which he is not qualified by previous experience, and incurring injury, is held to have been negligent.

So also if the precautions appropriate to dangerous situations are omitted, or if an unnecessarily dangerous method of doing work is chosen where the employee has the power of choice, or if he assumes or remains in a position of unnecessary danger, he will be held to be guilty of contributing to his own injury.

The use of defective or otherwise unsuitable instrumentalities may be negligent, though if a showing of due care in the circumstances is made, and the danger was not great and obvious, an action for damages may be maintained.

Violation of orders or of specific valid rules of which the employee has notice, and the neglect of warnings with reference to any of the acts named above will usually be held to imply negligence as a matter of law.¹

The general rule that the employee loses his right to a re-

¹ *Coops v. Lake Shore & M. S. R. Co.*, 66 Mich. 488, 33 N.W. 541; *Louisville & N. R. Co. v. Woods*, 105 Ala. 561, 17 So. 41.

covery by remaining at work after the discovery of unsafe conditions predicates a duty to leave the service in due time to escape the threatened dangers. How far he may omit this duty and still have recourse to his employer for compensation for injuries cannot be absolutely determined in any general sense, but it is allowable for the employee to remain a reasonable time, and especially if his immediate departure would jeopardize the safety of the public or the interests of his employers.¹

SECTION 77. *Comparative Negligence.* — A doctrine of comparative negligence, according to which the courts attempt to apportion the fault, and, if the preponderance of negligence seems to be chargeable to the employer, to award damages in a corresponding amount, has received some countenance at common law,² although in later cases in the same courts the doctrine has been repudiated, and a negligent employee is now barred from recovery unless it appears that his employer was guilty of willful negligence in connection with the occasion of the injury.³ The doctrine was seemingly approximated in a recent case in which the court awarded damages to a plaintiff whose "negligence was slight in comparison to that of the defendant," that of the latter being held to be the proximate cause of the accident.⁴ This case did not properly present the doctrine of comparative negligence, however, but rather that of "the last

¹ *Irvine v. Flint & P. M. R. Co.*, 89 Mich. 416, 50 N. W. 1008; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 473; *Houston & T. C. R. Co. v. Burnet*, 49 Texas Civ. App. 244, 108 S.W. 404; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60.

² *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N.E. 381; *Wichita & W. R. Co. v. Davis*, 37 Kans. 743, 16 Pac. 78.

³ *Chicago & A. R. Co. v. Myers*, 95 Ill. App. 578.

⁴ *Dobyns v. Yazoo & M. V. R. Co.*, 119 La. 72, 43 So. 934.

clear chance," according to which the party who last has a clear opportunity of avoiding an accident is considered responsible for it, notwithstanding the negligence of the other party.

Apart from statutory enactment, therefore, the doctrine of comparative negligence cannot be said to have a foothold in American jurisprudence at the present time. The Federal employers' liability law of 1908¹ and recent laws in several states² incorporate it in their provisions, the former by declaring contributory negligence not to be a bar to recovery, but that damages shall be diminished in proportion to the amount of the employee's negligence, the latter by the use of expressions that direct a measuring or comparison of the degree of negligence with which the two parties are chargeable, and a proportionate award of damages. This will doubtless give rise to some difficulties in the matter of administration, but it is clearly a more humane rule than that which relieves the employer from the consequences of anything short of willful negligence in cases where the employee's negligence in any degree contributed to his injury, and such legislation has been declared constitutional.³

SECTION 78. *The Fellow-servant Rule.* — The remaining defense to an employee's action for damages is what is known as the "fellow-servant" rule, or the doctrine of common employment. According to this, where the employer has discharged his duties as to a safe place, safe and suitable appliances, competent fellow-servants, etc., he is not liable to an employee for the acts or negligence of any mere fellow-servant or co-employee,

¹ 35 Stat. ch. 149.

² Nebr., Acts 1907, ch. 48; Nev., Acts 1907, ch. 214; N. Dak., Acts 1907, ch. 203; S. Dak., Acts 1907, ch. 219; Wis., Acts 1907, ch. 254.

³ *Missouri P. R. Co. v. Castle*, 172 Fed. 841 (C.C.A.); *Kiley v. Chicago, etc., R. Co.*, 138 Wis. 215, 119 N.W. 309.

provided such co-employee does not represent the employer. Or, as it has been otherwise stated, "A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative." If, however, the negligence of a coservant concurs with the negligence of an employer in causing the injury, the injured employee not contributing thereto, the employer will be liable in damages.

The well-known diversity, not to say confusion and contradictoriness of the rulings of the courts as to the application of this rule arises from the lack of precise and generally accepted definitions of the idea of common employment and of representation of the master. The relations of this doctrine to the other elements which determine the employer's liability are such that practically all that has been said with reference to the duties of the employer and the assumption of risks by the employee must be read in the light of the rulings of the jurisdictional courts on the subject, although the principles involved are held to be those of general law. In an opinion on a fellow-servant case which was before the Supreme Court of the United States a few years ago it was said that "there is perhaps no one matter upon which there are more conflicting and irreconcilable decisions in the various courts of the land than the one as to what is the test of common service, such as to relieve the master from liability for the injury of one servant through the negligence of another."¹ Not only do the courts of the various states differ, but in the individual states are found fluctuations of opinion from time to

¹ *Baltimore & O. R. v. Baugh*, 149 U.S. 368, 13 Sup. Ct. 914; *Northern P. R. Co. v. Dixon*, 194 U.S. 338, 24 Sup. Ct. 683.

time, and the acceptance of new standards, with departures from former positions, so that it is important to know the date of an adjudication in order to determine the present construction in the state. In the Supreme Court itself we find a decision of 1884 strongly modified in 1893 and practically reversed in 1899.¹

The attempt has been made in a number of states to fix by statute the relations of employees to one another, and to determine the liability of the employer for their acts or negligence; and this would appear to be the only practical method of attempting a solution of the problem as it exists to-day. It must be confessed, however, that even where statutes of different states are closely similar if not identical in phraseology, the effect of local interpretations is apparent in the varying constructions adopted.

The common law rule was enounced in England and America at about the same time, apparently independently, and to practically the same effect. Subsequent developments have been more favorable to the employee in this country than in England, however, some states having apparently lost sight of the foundations of the rule.

The reasons offered by the courts for the rule have been various, one being found in the view that the master's responsibility is at an end when he has used ordinary care to employ competent servants. It is held that the employee assumes the risk of the possible negligence of a co-employee as one of the incidents of the employment.² In another opinion of our Supreme

¹ Cf. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U.S. 377, 5 Sup. Ct. 184; *Baltimore & O. R. Co. v. Baugh*, *supra*; and *New England R. Co. v. Conroy*, 175 U.S. 323, 20 Sup. Ct. 85.

² *Hough v. Texas & P. R. Co.*, 100 U.S. 213, 25 L. Ed. 612.

Court it was said that the obvious reason for exempting the employer from liability is that the employee has or is supposed to have such risks in contemplation when he engages in the service, and his compensation is arranged accordingly, so that he cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.¹ Another reason is found in alleged grounds of public policy, as tending to make the employees more watchful over their own conduct and that of their fellows, thus benefiting employers, employees, and the public alike by the greater care with which they perform their duties.² In close connection herewith is the claim that any marked enlargement of liability to capital would lead to the withdrawal of capital from industrial enterprise, thus reducing the opportunities of employment and inflicting damage upon the whole community.³

Each of these reasons has been the subject of adverse criticism, and no one of them seems to give a satisfactory ground for excepting employees from the benefits of the doctrine of respondeat superior, or for compelling the employee to bear the burden of "pure accidents" which occur in the prosecution of undertakings, the advantages of which are to be reaped by the employer. The last two reasons mentioned above have perhaps been most frequently relied on as supporting the customary rule, though no such results as are therein indicated have followed the adoption of statutes greatly enlarging the rights of employees to recover for injuries following upon industrial accidents.

¹ Chicago, M. & St. P. R. Co. v. Ross, *supra*.

² Chicago, M. & St. P. R. Co. v. Ross, *supra*.

³ New Pittsburgh Coal & C. Co. v. Peterson, 136 Ind. 398, 35 N.E. 7.

The chief points requiring determination in any action involving the principles under consideration are those of common employment and of representative capacity. If it appears that the injuries complained of are the result of the negligence of a co-employee, the only hope of the plaintiff lies in showing that the negligent person was a vice-principal, representing the master at the time, and so devolving upon him a liability for the acts or omissions charged.

SECTION 79. *Common Employment.*—The first question, then, to be considered is what constitutes common employment. It was said in a leading case that, “prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow-servants,”¹ but this broad statement will not answer as a conclusive test. Not only employment by a common master, but also engagement in the performance of duties that may reasonably be said to tend to the accomplishment of the same end is necessary to meet general acceptance by the courts; nor is it a sufficient answer to say that all serve the profit or convenience of a common employer. Where another servant than the plaintiff, employed for a purpose entirely different from his duties, has negligently caused the injury complained of, it may well be said that they are not fellow-servants. But even with this qualification the statement is not definite enough to be of much use in determining particular cases, and the expressions used by judges in passing on the question of common employment throw little light on the subject. “Engaged in the same general business,” “the same general undertaking,” or “in promoting one common object” are frequent modes of expression, though in other cases the somewhat more

¹ *Baltimore & O. R. v. Baugh*, 149 U.S. 368, 13 Sup. Ct. 914.

restricted phrases, "services having an immediate common object," or "working in the same place to subserve the same interests," are used. The question involves both law and facts, but where the latter are undisputed, the decision becomes simply a matter of law, and the trial jury will not pass upon it.

SECTION 80. *Contemplated Risks.* — A theory that has been adopted in many cases is that the service is common if the negligence of the delinquent servant was, in a fair and reasonable sense, one of the risks contemplated by the injured employee in undertaking or continuing in his employment.¹ This is a reference of the case to the doctrine of assumed risks previously discussed, and involves the principles of knowledge, actual or presumptive. By this theory the relation of the duties of the injured and the negligent employees becomes the criterion, together with the question of the probability of the negligence of the one affecting the safety of the other. An injured employee's action will not be barred as matter of law by the single fact of service of a common master where the probabilities of injurious consequences from the delinquent servant's negligence were too remote to be reasonably foreseen ;² since the fellow-service rule "should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows."³ This has also been termed the association theory, and the supreme court of Kentucky in a recent case declared it to be the doctrine of that state, as against the departmental theory.⁴ Yet, inasmuch as the question is not one simply of locality, but of likelihood of connected con-

¹ Chicago, M. & St. P. R. Co. v. Ross, 112 U.S. 377, 5 Sup. Ct. 184.

² Northern P. R. Co. v. Hambly, 154 U.S. 349, 14 Sup. Ct. 184.

³ St. Louis, A. & T. R. Co. v. Welch, 72 Tex. 298, 10 S.W. 529.

⁴ Louisville R. Co. v. Hibbitt, 139 Ky. 43, 139 S.W. 319.

sequences, mere remoteness is not sufficient to negative the idea of coservice where the other elements are present, though at what point the line shall be drawn is often difficult to determine. It was said in a recent case that the assumption of risks is as broad as the employee's reasonable anticipation of danger.¹

SECTION 81. *Departmental Doctrine.* — A second theory, based on a different test from that of contemplated risk, is naturally suggested by the considerations indicated above. In the application of this theory the classification turns on the relation of employees in different departments of the employer's establishment or business, more or less segregated. In the courts in which it is adopted the general test is one of the identity or diversity of the departments in which the plaintiff and the delinquent employee were at work. Since, however, no satisfactory definition of the term "department" has yet been furnished, the test may be more accurately said to be one of consociation of duties, *i.e.*, such a relation of the duties of the injured employee and those of the delinquent co-employee as that the former had a reasonable opportunity for protecting himself from injury by his own efforts. All courts would unite in ruling out the defense of co-employment in certain classes of cases, and there is a hopeless contrariety of views as to where this defense shall be allowed and where denied. Even in those states where the defense is most frequently based on what has been called the departmental doctrine, this test is not the only and final one, as it is found that while departments may be distinct, those employed therein may be thrown into such contact that fellow-service cannot be denied, and *vice versa*. While, therefore, the two theories presented lead to real and wide differences of view,

¹ Lukie v. Southern P. R. Co., 160 Fed. 135.

there is a class of cases where they approach, and the conclusions reached therein may be referred indifferently to the one reason or the other.

SECTION 82. *Representation of the Employer.* — No court goes so far as to assert without qualification that all employees of a common master, or even in the same department, are co-employees in such sense as to relieve the master of responsibility for the negligent acts of those who are his representatives, either permanently, or as to the matter in hand. But here again there are as irreconcilable differences as any that have been noted, and it will be possible only to present the different views without attempting to summarize them or to bring them into harmony.

There are in general two grounds on which adjudications are based: One, the mere superiority in rank of the negligent employee and the other, the nature of the injurious act, *i.e.*, whether or not it was one which was connected with the discharge of the so-called nondelegable duties of the employer. Like other distinctions made in the applications of the fellow-servant rule, there are cases in which the decision might be reached by the use of either test, but in other cases the adoption of the one rule will be found to be decisive along lines not capable of being reached by the other unless by giving a special meaning thereto.

SECTION 83. *Test of Rank.* — The representative of the employer is most frequently termed by the courts a vice-principal, though the actual functions of his employment and not the designation by which he is known while at work will be determinative in any case. This rule has been made to extend so far as to relieve the employer even when the injured employee in good faith regarded the negligent employee as his superior, not

knowing of the latter's discharge from that position.¹ On the other hand, a coservant intrusted temporarily with the duties of a vice-principal must be answered for by the employer no less than if he were permanently holding the position. Representation, however, must be actual. In a majority of the jurisdictions of the Union the mere fact of superiority of rank is not sufficient to charge the employer with liability for the negligence of the superior servant, though the negligence complained of may have been connected with the giving of orders.² Nor do these courts consider that the adding on of the power to hire and discharge is sufficient to convert a foreman of subordinate grade to the rank of vice-principal, as mere fear of discharge will not justify the assumption of undue risks.³ And this is true even when there is power of control.⁴ Thus it was said in a recent case that "a servant who sustains an injury from the negligence of a superior agent, engaged in the same general business, cannot maintain an action against their common employer, although he was subject to the control of such superior agent, and could not guard against his negligence or its consequences."⁵ This rule is based on the theory that the contracting employee assumes the risk of his superior's negligence as one of the ordinary risks of his employment, but is subject to the restrictions resulting from the application of the doctrine of nondelegable duties.

This principle does not, except in a few states, extend to

¹ *Allen v. Goodwin*, 92 Tenn. 385, 21 S.W. 760.

² *Kimmer v. Weber*, 151 N.Y. 417, 45 N.E. 860; *McLean v. Blue Point G. M. Co.*, 51 Cal. 255.

³ *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U.S. 86, 18 Sup. Ct. 40.

⁴ *Vitto v. Keogan*, 15 App. Div. 329, 44 N.Y. Supp. 1; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Vilter Mfg. Co. v. Otte*, 157 Fed. 230 (C.C.A.).

⁵ *Keenan v. New York, L. E. & W. R. Co.*, 145 N.Y. 190, 39 N.E. 711.

actual superintendents or managers of an employer's business; nor is it vital that such representative shall not be employed in part at actual labor, or that he shall receive a higher salary than his subordinates. No fixed rule is discoverable, but to render the employer liable the employee "must be more than a mere foreman to oversee a batch of hands and direct their work under the supervision of the master."¹ Or, as stated in another case "he must have general power and control over the business, and not mere authority over a certain class of work or a certain gang of men."²

SECTION 84. *Superior Servant Doctrine.* — While such is the rule in the greater number of American jurisdictions, what is known as the "superior servant doctrine" has been adopted in a number of states.³ The form of this rule varies in different states, or even in the same court; and there is inconsistency in its application to different cases, resulting from an unwillingness on the part of some courts to carry it out to its logical conclusions, and from an indefiniteness as to the point where it shall cease to control. It was characterized as a "discredited" doctrine in a recent case,⁴ but it is not only recognized in a number of jurisdictions as a rule of common law, but has moreover received statutory recognition.⁵

The forms in which the doctrine is expressed vary, but all are

¹ *Dobbin v. Richmond & D. R. Co.*, 81 N.C. 446, 31 Am. Rep. 512.

² *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50.

³ *Consol. Coal Co. v. Wombacher*, 134 Ill. 57, 24 N.E. 627; *Walker v. Gillett*, 59 Kans. 214, 52 Pac. 442; *Southern R. Co. v. Barr*, 21 Ky. L. R. 1615, 55 S.W. 900 (but see *Cin., N. O. & T. P. R. Co. v. Hill's Adm'r.*, 28 Ky. L. R. 530, 89 S.W. 523); *Faren v. Sellers*, 39 La. Ann. 1011, 3 So. 363.

⁴ *Lukic v. Southern P. R. Co.*, 160 Fed. 135.

⁵ *Cal., Acts 1907, ch. 97*; *Ohio, Gen. Code, sec. 9016*; *S.C., Const., Art. 9, sec. 15*.

to the effect that the employer is liable to an injured employee where his injury is caused by the exercise of the authority conferred by the employer on another employee.

In one case¹ the following language was used: "Where the master appoints an agent with a superintending control over the work, and with power to employ and discharge hands and direct and control their movements in and about the work, the agent . . . stands in the place of the master." Various grounds are offered in support of this view, the most satisfactory one being that advanced in an early Ohio case,² in which the duty of supervision and control was treated as nondelegable; or, as stated in a Missouri case,³ "the master, by appointing a foreman or other person to superintend the work, with power to direct the men under him how to do it, thereby devolves upon such person the performance of those duties personal to the master."

SECTION 85. *Status of Manager.* — It has already been indicated that there are some states in which what may be called the "extreme view" of fellow-service is held, *i.e.*, that even a general manager is a fellow-servant.⁴ This may be called the English as opposed to the American view, as it prevails where the rulings of the House of Lords are the precedent; while in by far the greater number of the states of this country there is a recognition of an actual superintendent or general manager as the master's representative, for whose acts the master is accountable. While the cases involving the question of vice-principal-

¹ *Stephens v. Hannibal & St. J. R. Co.*, 86 Mo. 221.

² *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201. (See also *Little Miami R. Co. v. Stevens*, 20 Ohio 415.)

³ *Miller v. Missouri P. R. Co.*, 109 Mo. 350, 19 S.W. 58.

⁴ *Curley v. Hoff*, 62 N.J.L. 758, 42 Atl. 731; *Mobile & M.R. Co. v. Smith*, 59 Ala. 245; *Meehan v. Spiers Mfg. Co.*, 172 Mass. 375, 52 N.E. 518; *Howd v. Miss. C. R. Co.*, 50 Miss. 178.

ship in this form naturally disclose for the most part conditions of what may be considered permanent relationship, the same rule has been held to apply to persons occupying the position only temporarily ; as, for instance, in the performance of specific undertakings, after the completion of which the representative would assume his customary rank as co-employee with his temporary subordinates. Both the scope and the reason of the rule are in part indicated in the opinion given in a New York case,¹ in which it was held that where the "master withdraws from the management of the business, or the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the master is liable for the neglects and omissions of duty of the one charged with the selection of the other servants, in employing and selecting such servants, and in the general conduct of the business committed to his care."

In some of the states in which the courts had favored the view that the fellow-servant rule extended even to employees in charge of work, legislative enactments have intervened, providing that for the exercise of superintendence intrusted to any employee by the employer the latter should be responsible.²

SECTION 86. *Heads of Departments.* — On principle, a court that recognizes the manager of an entire business as the master's representative cannot well refuse similar recognition to persons in charge of single branches of an undertaking, as in large industrial undertakings the head of such a branch is completely in control of the men under him, and the management of its affairs is as fully in his hands as if it were an independent

¹ *Malone v. Hathaway*, 64 N.Y. 5, 21 Am. Rep. 573.

² Ala., Code, sec. 3910 ; Mass., Acts 1909, ch. 514, sec. 127 ; Miss., Const., sec. 193, Code, sec. 4056.

business. Thus it has been held by the United States Supreme Court¹ that there is a "clear distinction to be made in their relation to their common principal, between servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department in which their duty is entirely that of direction and superintendence." The limits of the application of this principle are not clearly marked. The courts making most frequent use of it are the federal courts, and their position may be considered as fairly presented in the statement that it is only individuals who are in charge of separate branches and departments of service, and have entire and absolute control therein, that are properly to be considered, with respect to employees under them, as vice-principals.

SECTION 87. *Character of Act as Test.* — In cases in which vice-principalship is conceded there is yet a possible distinction as to the kind of acts for which the employer will be held responsible. In the first place it must obviously be a negligent act; and, secondly, it must be within the scope of the agent's authority and be connected with the proper business of his employment. Besides these points, as to which it is only necessary to establish the facts in order to determine their status, the question of the official or nonofficial quality of the acts considered may be raised.

In accordance with this view, a doctrine of dual capacity has been developed, according to which some acts of the employer's representative may be taken as those of a mere servant and not of such a nature as to make the employer responsible for

¹ Chicago, M. & St. P. R. Co. v. Ross, 112 U.S. 377, 5 Sup. Ct. 184.

negligence therein.¹ In the courts adopting this doctrine, the negligent performance of the so-called "nondelegable" duties by one who is, by virtue of his rank, conceded to be a vice-principal casts a burden on the employer, while the same person may, as a coservant, perform an act of manual labor negligently, and to the injury of a fellow-workman, without devolving any liability therefor upon the employer. This doctrine also has received statutory recognition.²

On the other hand are to be ranged those courts which do not consider that the character of a vice-principal shifts with the nature of his acts, holding that the master is liable for the negligence of his representative whether the negligent act was done by his own hand or by another under his orders.³ Federal cases supporting this view may also be found.⁴ In Missouri it was recently declared by the supreme court that the doctrine of dual capacity was fully established in that state,⁵ and a number of cases were cited in support of that view, beginning with *Harper v. Indianapolis and St. Louis R. Co.* (47 Mo. 567, 4 Am. Rep. 358). It was held in a later case, however,⁶ that the negligent performance by a section foreman of ordinary labor such

¹ *Reed v. Stockmeyer*, 74 Fed. 186 (C.C.A.); *Mann v. Oriental Print Works*, 11 R.I. 152; *Crispin v. Babbitt*, 81 N.Y. 516, 37 Am. Rep. 521; *St. Louis, A. & T. R. Co. v. Torrey*, 58 Ark. 217, 24 S.W. 244.

² Ala., Code, sec. 3910; Conn., G.S., sec. 4702; Mass., Acts 1909, ch. 514, sec. 127.

³ *Illinois C. R. Co. v. Josey's Adm'x.*, 22 Ky. L. R. 1795, 61 S.W. 703; *Consol. Kansas City Smelting & Ref. Co. v. Peterson*, 8 Kans. App. 316, 55 Pac. 673; *Crystal Ice Co. v. Sherlock*, 37 Nebr. 19, 55 N.W. 294; *Purcell v. Southern R. Co.*, 119 N.C. 728, 26 S.E. 161; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510.

⁴ *Au v. New York, etc., R. Co.*, 29 Fed. 72; *Hardy v. Minneapolis, etc., R. Co.*, 36 Fed. 657.

⁵ *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S.W. 664.

⁶ *Hutson v. Missouri P. R. Co.*, 50 Mo. App. 300.

as a coservant would engage in, resulting in injury to a workman in his gang, was the negligence of the employer: "There is no just or logical distinction between the act of the vice-principal in negligently ordering a servant to do an imprudent thing and in doing the same himself."¹ In Texas also decisions in apparent conflict may be found, some² denying the dual capacity theory, while a case of the same date³ supports it. Examples of lack of harmony could be adduced from other states; and, as appears from the citations given, the rulings of the federal courts are not uniform.

A federal judge in a recent case⁴ declared that the test of rank has been largely superseded in the federal courts by the test of the character of the act. "The question is always," said the judge, "whether the negligence charged is the neglect of a primary and absolute duty of the master to the servant. If such be its character, no delegation of the performance of that duty to another, no matter how inferior his rank may be in the master's service, can relieve the liability of the master for its neglect;" and the characterization of the superior servant doctrine as discredited indicates the same view.⁵

SECTION 88. *Tests not Mutually Exclusive.* — It is not to be understood that the different tests of vice-principalship are mutually exclusive in any jurisdiction, or even in any case in which the question arises. The courts may approach the

¹ See further, *Dayharsh v. Hannibal & St. J. R. Co.*, 103 Mo. 570, 15 S.W. 554, and *Russ v. Wabash W. R. Co.*, 112 Mo. 45, 20 S.W. 472.

² *Sweeny v. Gulf, etc., R. Co.*, 84 Tex. 433, 19 S.W. 555; *Texas & P. R. Co. v. Reed*, 32 S.W. 118 (Tex. Civ. App.).

³ *Gulf, C. & S. F. R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S.W. 706.

⁴ *Peters v. George*, 154 Fed. 634.

⁵ *Lukie v. Southern P. R. Co.*, 160 Fed. 135.

question in either way, or, as frequently happens, expressions are used in a single case which refer some to one and some to the other method of determining the point at issue. The general result of using the test of the character of the act may be said to be favorable to the employee, since under it "an act of the master" may be performed by an employee of whatever rank; though obviously it favors the dual capacity theory, and tends in so far to limit recovery for the acts of a superior.

It is clear that the opportunity for litigation, in connection with the application of the test of the character of the act, lies not so much in the acceptance or rejection of general principles, or of the doctrine of representation as such, for a determination of these points having been once made in a jurisdiction they may be said to be the local law; rather, the numerous accumulated decisions bear mainly on the question of the boundaries between the field covered by the doctrine of nondelegable duties and that covered by the fellow-servant doctrine, or, as otherwise expressed, between "the act of a master and the act of an employee," boundaries which are, as has been said with good reason, "sometimes quite vague and shadowy." Thus it is established that one of the employer's duties is to use due care to furnish and maintain a safe place to work, while a negligent act on the part of an employee may at any moment render a place unsafe for his co-employees. When or at what point liability attaches is a question that comes before the courts to be determined on the merits of the particular facts, and, apart from precedents presenting a practical identity of conditions, the question may be fairly considered an open one. Certain general principles are, of course, settled in any case, but, after all, there remains an undetermined margin on the merits of which

the plaintiff grounds his undertaking for a recovery, hoping that in his particular case the scales will turn in his favor, so that instead of conclusive classifications being formed, it appears rather that the volume of litigation relating to this department of the law of employers' liability is steadily growing.

SECTION 89. *Modification of Employers' Liability by Statute.*— It appears to be the consensus of legislative opinion that of all the weak points in the American law of employers' liability, the one that presents the most objectionable features is that represented by the fellow-servant doctrine. At least it is to this phase that legislatures have most frequently addressed themselves, one, that of Colorado, having achieved the sole distinction of completely abrogating the doctrine.¹ This statute was declared constitutional by the supreme court of the state,² the court ruling that the act renders the employer liable for damages resulting from injuries to an employee, caused by the negligence of a co-employee, in the same manner and to the same extent as if the negligence were that of the employer. The law does not affect the defenses of assumed risks or contributory negligence.

Liability laws patterned more or less closely after the British law of 1880 on this subject have been enacted in a number of jurisdictions.³ These acts are frequently referred to as "fellow-servant laws," since their principal feature is the abrogation, as to the classes of employees enumerated and under the condi-

¹ Supp., secs. 1511f, 1511g. See also pp. 186, 197, 198.

² *Vindicator Consol. Min. Co. v. Firstbrook*, 36 Colo. 499, 86 Pac. 313.

³ Ala., Code, sec. 3910; Cal., Acts 1907, ch. 97; Colo., Supp. secs. 1511a-1511e; Idaho, Acts 1909, p. 34; Ind., A.S., sec. 7083; Me., Acts 1909, ch. 258; Mass., Acts 1909, ch. 514, secs. 127-134; Mich., Acts 1909, No. 104; N.J., Acts 1909, ch. 83; N.Y., Acts 1910, ch. 352; Pa., Acts 1907, No. 329; P.R., R.S., secs. 322-331; and Texas, Acts 1909 (extra session), ch. 10.

tions specified, of the defense of common employment.¹ The introductory provision as to defects in ways, etc., adds little or nothing to the common law rule as followed in this country as to the duty of the employer as to safe places and appliances.² The same may be said of the provision relative to the reporting of facts by the employee, if cognizant thereof; though as most of the statutes make the employee's failure to report a bar to his recovery, if injured, while at common law such failure was only an added reason why he could not, under such circumstances, recover, it may be said that this provision places an employee who knows of the defect in a more unfavorable position than before, so far as the question of the assumption of risk is concerned. Nor do these laws much affect the defense of contributory negligence. They are chiefly effective in their determination of responsibility for the acts of superiors, and of designated classes of employees on railroads. As to superiors, it may be noted that different laws recognize both the superior servant³ and dual capacity⁴ doctrines. The California statute distinctly presents the departmental doctrine; so that it is clear that even the enactment of statutes which clearly enlarge the employer's responsibility, as do these, do not secure uniformity, since they are both differently phrased and differently construed.

The rule that statutes in derogation of the common law will be strictly construed has generally been modified by the state courts in respect of the acts above discussed, in order that the

¹ *Coffee v. New York, etc., R. Co.*, 155 Mass. 21, 28 N.E. 1128.

² *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N.E. 766.

³ *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. 88.

⁴ *Gmaehle v. Rosenberg*, 178 N.Y. 147, 70 N.E. 411.

manifest ends of the laws may be attained.¹ They in no way interfere with the common law rights of an injured employee, and he may, if he prefers, bring his action at common law instead of under the statute.

SECTION 90. *Statutes Affecting Designated Employments.* — A very considerable number of states have laws applying specifically to the business of railroading, some of them applying to all employees, and some only to those engaged in the operation of the road. These laws range in effect from the slightest possible deviation from the principles of the common law to a complete abrogation of the defense of fellow-service, and important changes in those of contributory negligence and of assumed risks.

The constitutionality of laws relating to railroads only has been repeatedly decided in their favor in the face of contentions that they are discriminatory, not affording railroads equal protection with other businesses, and that the laws deprive railroad companies of their property without due legal process, thus alleging that such laws are in conflict with the fourteenth amendment of the Constitution of the United States. The Kansas statute abrogating the defense of fellow-service was attacked in the United States Supreme Court,² which declared the law valid, using in part the following language, which shows the general grounds on which such laws are upheld : —

“The greater part of all legislation is special, either in the objects sought to be ascertained by it, or in the extent of its application. Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the

¹ *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146.

² *Missouri P. R. Co. v. Mackey*, 127 U.S. 205, 8 Sup. Ct. 1161.

laws, because it is special in its character. When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad companies are, without discrimination, made subject to the same liabilities."

Special laws relating to mine labor¹ receive judicial support on the grounds set forth in the case just cited.²

SECTION 91. *Promise to Repair.* — In cases where repairs are needed, and the fact is known to the servant, the risk involved in continuing in the service under the conditions of disrepair may be shifted to the employer by his giving a promise to remedy the defective conditions, and the effect of the promise is the same whether it is made in response to a complaint by the servant or voluntarily.³ The fact that a promise was made does not suffice to conclude the investigation, however, but serves only to introduce new facts for consideration. The

¹ Md., Acts 1902, ch. 412; Mo., Acts 1907, p. 251; Ill., R.S., ch. 93; Ohio, Acts 1910, p. 52.

² *State v. Murlin*, 38 S.W. 923 (Mo.); *Wilmington Star Min. Co. v. Fulton*, 205 U.S. 60, 27 Sup. Ct. 412.

³ *Virginia & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S.E. 976.

promise must be made by the employer or his representative, and must be the inducement for the employee's continuance in the situation where the injury occurred.¹

Though the effect of such a promise is not entirely excluded from consideration in cases where it was given before the beginning of work, the doctrine applies chiefly to cases where it was made subsequent to such beginning. It is then held to rebut for a reasonable length of time the presumption that the employee assumed the risk or that he was guilty of contributory negligence in remaining in a place of known danger, though it does not of itself entitle an injured employee to recovery.²

SECTION 92. *Direct Orders.* — The fact that an employee was acting under direct orders at the time his injury was received is also influential in determining his right to recover where such order had been given.³ The order must be given by the employer or his representative acting with due authority, though it may reach the employee through an intermediary; it must also be the cause of the action which resulted in the injury and it must be of itself negligent under existing circumstances.⁴ When these conditions are met, a presumption is raised in the employee's favor, either that he was excusably ignorant of the risks to which his obedience exposed him or that his action was in some degree coerced, so that the employer's customary defenses of assumed risk and of contributory negligence are proportionately, though not absolutely, negatived. If the order

¹ *Bodwell v. Mfg. Co.*, 70 N.H. 390, 47 Atl. 613.

² *Counsell v. Hall*, 145 Mass. 468, 14 N.E. 530; *Virginia & N.C. Wheel Co. v. Chalkley*, *supra*.

³ *Haley v. Case*, 142 Mass. 316, 7 N. E. 877.

⁴ *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412; *Richmond & D. R. Co. v. Rudd*, 88 Va. 648, 14 S.E. 361.

does not direct exposure to other than the ordinary, assumed risks, no negligence can be charged to the master in connection therewith. Neither do the courts hold him negligent where he was ignorant, actually and without fault, of the dangers to which a servant would be exposed by obedience. But where the employer knew of the danger and failed to warn the servant, and still more where the servant was both ignorant and incapable, physically and mentally, of safely performing the work directed, the order will be held negligent and the employee will be entitled to recover for resulting injuries.

SECTION 93. *Assurances of Safety.* — In connection with a direct order, or in response to some complaint or inquiry of the employee, an employer may give assurances of the employee's safety. This may be in the form of a statement that the work does not involve danger or that the workman will be protected in its performance. Where such an assurance is given by an authorized person, and it is negligently given, so that the employee is thereby induced to do work or to enter a place other than would probably have been the case apart from the assurance, the employee will not be, as a matter of law, chargeable with either an assumption of the risk or with contributory negligence if injury results.¹ This rule is subject to the same qualifications, on grounds of the actual knowledge of the employee and his going into places of obvious danger, as have been set forth in other connections.² Yet, inasmuch as the law regards the employer's knowledge of the conditions of the employment as superior to that of the employee, it considers his assurance of safety, especially when accompanied by an order to proceed, to

¹ *Larson v. Haglin*, 103 Minn. 257, 114 N.W. 958.

² *Atlantic C. L. R. Co. & Beazley*, 54 Fla. 311, 45 So. 761.

be sufficient warrant for the employee to lay aside his scruples and to proceed with perhaps less vigilance than he would have otherwise exercised.

SECTION 94. *Variation of Scope and Course of Employment.* — The principles controlling the liability of the employer have been considered only in their application to cases where the injury was received by a servant engaged in the duties for which he was specifically or impliedly hired. If the employee leaves his customary work voluntarily and goes where he has no right to be or undertakes to use machinery which it is not his business to use, he is no better than a trespasser to whom his master owes no duty.¹ Acquiescence by the employer in the conduct of the employee may be construed, however, as extending the scope of employment to the new line of duties, carrying the corresponding mutual obligations. Where the act is for the employer's benefit it may be decided as a matter of fact that it was reasonably a part of the employee's duty, though in the absence of both command and acquiescence recovery would be, to say the least, doubtful.

The case is different where there is a specific direction from the employer or other competent person ordering a temporary departure from the contractual lines of duty. The risks incident to the new employment are in a sense extraordinary, as they are outside of the regular line of duty and were not assumed under the contract relative thereto. The elements necessary to a recovery in case of injury resulting from the undertaking of such work are: that the departure from the regular

¹ *Stagg v. Edward Western Tea & Spice Co.*, 169 Mo. 489, 69 S.W. 391; *Green v. Brainerd & N. M. R. Co.*, 85 Minn. 318, 88 N.W. 974; *Stodden v. Mfg. Co.*, 138 Iowa 398, 116 N.W. 116.

employment should be substantial; that it should be in obedience to the orders of a competent person; and that the order given be negligent.¹ The mere fact that the work was not that for which the employee contracted is not enough, since a command of the employer and obedience without objection by a person of mature years and ordinary capacity present in themselves no conditions of culpability. If, however, the master knew of some unfitness on the part of the servant or of some increased danger in the new situation of which the employee was uninformed, the giving of the order may be considered as negligent. In the absence of grounds on which to support the charge of negligence, workmen will generally be considered as assuming the risk of the new undertaking, in so far as they are known or are of that open and patent character that charges a person of ordinary intelligence with a knowledge of them.²

Contributory negligence is not ordinarily allowed as a defense to an employer giving orders for a departure from the usual line of service, the reason therefor being practically that given above where the question of obedience to direct orders was discussed, *i.e.*, that a person will not be heard to say that it is negligence to carry out his own orders. One cannot, however, enter upon a work involving obvious and extreme risks and claim the employer's protection in so doing, nor can he enter on work for which he knows himself to be essentially unfitted but as to which he makes no protest or objection. Still the presumption that the employer is better informed as to the conditions of the work and the necessary qualifications for doing it properly, and the rule of the customary duty of obedience to a superior, will serve to relieve the employee even in such cases.

¹ Galveston Oil Co. v. Thompson, 76 Tex. 235, 13 S.W. 60.

² Felton v. Girardy, 43 C.C.A. 439, 104 Fed. 127.

The variety of facts involved in cases presenting the question of course of employment is so great that it would practically require an enumeration of the decisions to present the attitude of the courts thereon. The general rule has been mentioned, *i.e.*, that the employer is not liable for injuries incurred by employees going beyond the scope of their employment. They approximate the condition of volunteers, with whom they are sometimes classed. By the term "volunteers" is meant persons not in the service of the employer prior to their engaging, without authorization, in the employment at which they received the injury complained of, and their situation is in general no better than that of trespassers. They are held to have assumed the limitations of servants without acquiring the right to claim the performance of a master's duties toward them.¹ They will be protected from wanton injuries at the hands of the regular employees, however,² and the circumstances may be such that they will be held to warrant a service rendered at the invitation of persons not ordinarily authorized to hire employees so as to give to injured volunteers a right to recover.³ Or it might be said that the situation of the persons so employed is modified so that they are no longer regarded as volunteers, at least not as trespassers.

The reason for the rule as to volunteers is that no one can be subjected to the obligations of an employer, which are the result of contract, without his consent thereto, either express or implied. This being the case, the situation of a person under-

¹ *Langan v. Tyler*, 114 Fed. 716 (C.C.A.).

² *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119; *Evarts v. St. Paul, M. & M. R. Co.*, 56 Minn. 141, 57 N.W. 459.

³ *Bradley v. New York C. R. Co.*, 62 N.Y. 99; *Barstow v. Old Colony R. Co.*, 143 Mass. 535, 10 N.E. 255.

taking to render service, either on his own motion or at the invitation of an unauthorized person, gains nothing from the fact that the danger was not appreciated.

SECTION 95. *Details of Work.* — A general limitation of the obligations of the employer is to be found in the rule that he is not bound to supervise the purely operative details of his employees' undertakings. He will not be responsible, therefore, for merely transitory dangers, "existing only on the single occasion when the injury was sustained, and due to no fault of plan or construction, or lack of repair, and to no permanent defect or want of safety in the defendant's works, or in the manner in which they had been ordinarily used."¹ So, also, if the danger arises in the progress of the work and is one of the understood conditions of such progress, no liability attaches to the employer.

The improper use of suitable instrumentalities, or failure to use those furnished, erroneous choice of methods of work, or improper orders and assignments of subordinates to duty are acts of a superior, for which the employer will not in general be held responsible.² In order that the employer may be so relieved, however, it has been held to be necessary that the injured employee should have knowledge of his superior's lack of authority in respect of the order given.³ In the same category are found the giving of signals, the transmission of orders, and the manipulation of instrumentalities (*e.g.*, cars on railway tracks) during the progress of work.⁴ The adjustment of temporary structures and appliances used in the course of the work are within the rule of nonliability.

¹ *Meehan v. Spiers Mfg. Co.*, 172 Mass. 375, 52 N.E. 518.

² *Cullen v. Norton*, 126 N.Y. 1, 26 N.E. 905.

³ *Waiczenko v. Oxford Paper Co.*, 106 Me. 108, 75 Atl. 328.

⁴ *Martin v. Atchison, T. & S. F. R. Co.*, 166 U.S. 399, 17 Sup. Ct. 603.

The reverse has been held where the appliance causing the injury was furnished by the employer himself, where there was an implied undertaking that the appliance furnished should be in a completed condition, where the employer failed to furnish suitable material for the preparation of an instrumentality, where the employee did not have free choice in the selection of materials, and where the danger resulted from conditions which might properly be classed as permanent.

SECTION 96. *Contracts with Labor Organizations.* — A factor of minor importance hitherto, but involving possibilities of considerable moment, is one appearing in connection with contracts in which associations of workmen retain for themselves the right to indicate the employment of certain persons as fellow-workmen, foremen, or for the performance of special duties in connection with the employer's undertaking. Such a contract operates as a restriction on the employer's right to freely contract for and direct the services of his employees, and in equal measure diminishes his liability for their actions. Thus, where a contractor deals with representatives of an organization, who furnish him the desired number of men, with a foreman, none of them being of his selection, he will not be held responsible for the injury of a workman resulting from the negligence of the foreman;¹ and the same view was taken in a case involving the employment of a shot-firer by the members of a union made up of the employees in a mine.² A contrary conclusion was reached in a case involving much the same conditions, the court saying that it was, in any case, incumbent on the employer to make reasonable effort to ascertain the competency and fitness of an

¹ *Farmer v. Kearney*, 115 La. 722, 39 So. 967.

² *Edward's Admr. v. Lam.*, 132 Ky. 32, 119 S.W. 175.

employee requiring special qualifications, regardless of his contract with the association ;¹ in view of the nature of the contract and the clear intention of the parties to secure to the union the ordering of the very details involved in the arrangement, it would seem that the better reason sustains the views of the courts of Louisiana and Kentucky.

SECTION 97. *Employers' Insurance against Liability.* — Employers' liability insurance is a form of insurance by which the insuring company assumes either the liability of the employer for injuries to his employees, or the duty of making good the losses of the employer on account of such liability. The company usually agrees to undertake the defense in case action is brought in a court of law, and conditions in the policy as to notice of accidental injuries and of proposed suits must be complied with ;² though the courts will give a reasonable construction to the language used.³ Where the policy limits the company's liability to a reimbursement of sums paid out by the insured employer on account of damages paid after trial of the issue, no action lies by an employee of an absconding employer,⁴ nor an insolvent one,⁵ since it is the employer and not the employee who is insured, and, no payment having been made by the former, no liability under the policy rests on the company; or, as said in another case, such a policy is not a contract of insurance against liability, but of indemnity against loss by

¹ *Pearson v. Steamship Co.*, 51 Wash. 560, 99 Pac. 753.

² *Deer Trail Consol. Mining Co. v. Maryland Casualty Co.*, 36 Wash. 46, 78 Pac. 135.

³ *Columbia Paper Stock Co. v. Fidelity, etc., Co. of New York*, 104 Mo. App. 157, 78 S.W. 320.

⁴ *Connolly v. Bolster*, 187 Mass. 266, 72 N.E. 981.

⁵ *Carter v. Ætna Life Ins. Co.*, 76 Kan. 275, 91 Pac. 178.

reason of liability.¹ The company's contract to defend in an action against an employer is valid and its interest is sufficient to protect it against the charge of wrongfully maintaining the employer in the suit against him.²

In case of the insolvency of an insured employer, an assignment of assets is equivalent to a settlement of a perfected claim against himself, so far as the company is concerned, and it becomes at once liable for the *pro rata* sum that the judgment of the injured employee would produce in the settlement of the estate of the insolvent, and no more; the injured employee may by a cross-bill in action against the company by the trustee secure the payment of such amount to himself.³ A settlement by the company made in good faith with an employer for a judgment obtained against him cuts off all recovery as against the company, however, even though it transpires that the employer was in fact insolvent at the time, and had paid nothing on the judgment; ⁴ *a fortiori*, a settlement of a judgment against an insolvent employer by the payment by him of an agreed reduced sum, such sum being known to the employee as coming from the insuring company, will prevent any further recovery from the company by the employee.⁵

If the policy insures the employer against liability on account of injuries to employees, however, the company assuming the defense in legal proceedings and settlement of any loss; or if it stipulates that the company shall pay "all damages with which the insured might be legally charged, or required to pay or for

¹ *Frye v. Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395.

² *Breeden v. Frankfort, etc., Ins. Co.*, 220 Mo. 327, 119 S.W. 576.

³ *Moses v. Travelers' Ins. Co.*, 63 N.J. Eq. 260, 49 Atl. 720.

⁴ *Kinnan v. Fidelity & Casualty Co.*, 107 Ill. App. 407.

⁵ *Breeden v. Frankfort, etc., Ins. Co.*, *supra*.

which it might become liable," the contract inures directly to the benefit of the employee to such an extent that he may, after judgment against the employer and without waiting for settlement, secure the payment to himself of the amount of the judgment by proceedings in garnishment against the company,¹ and the fact of the employers' making an assignment in bankruptcy before the suit was begun does not reduce or otherwise affect the claim of the employee against the company,² since the liability is fixed on the happening of the injury giving rise to the claim, even though the amount thereof has not yet been determined.³

Where the employer takes out a blanket policy, and separate certificates are issued to the individual employees, from whose wages deductions are made by the company for the payment of premiums, the failure of the insurance company to pay the amount of the policy entails no obligation on the employer, only the company being liable.⁴

A policy covering accidental injuries was held to require an insurance company to reimburse an employer who had been compelled to pay damages on account of bodily disease contracted by an employee who was put to work in an insanitary employment;⁵ a policy will not be construed to extend to classes of employees hired during the term of its existence, but engaged in a different kind of employment from that contem-

¹ *Hoven v. Employers' Liability Assurance Corp.*, 93 Wis. 201, 67 N.W. 46; *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N.W. 353; *Pickett v. Fidelity & Casualty Co.*, 60 S.C. 477, 38 S.E. 160.

² *Anoka Lumber Co. v. Fidelity & Casualty Co.*, *supra*.

³ *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 82 Md. 535, 34 Atl. 778; *Ross v. Am. Emp. Liability Ins. Co.*, 56 N.J. Eq. 41, 38 Atl. 22.

⁴ *Carpenter v. Chicago & E. I. R. Co.*, 21 Ind. App. 88, 51 N.E. 493.

⁵ *Columbia Paper Stock Co. v. Fidelity, etc., Co. of New York*, *supra*.

plated by its terms,¹ but employment necessarily incidental to the operations embraced by the policy will be held to be covered thereby, even though not strictly of the class of operations described in it.² On the other hand, the similarity of construction work to repair work will not bring the former within the provisions of a policy intended to cover only the latter.³ If the contract of insurance stipulates that the company will not be liable for injuries resulting from the employer's failure to maintain the safety devices and appliances prescribed by law, the company cannot withdraw from the defense of an action on the mere charge of such failure, but must proceed until the question is determined in the course of trial.⁴ Such a provision in a policy is not repugnant to a general undertaking to indemnify the insured employer against loss from common law or statutory liability to his employees.⁵ Nor will the provision in a policy prohibiting compromises by employers bar the employer's claim to an indemnity where the company denied its liability and refused to defend, and the employer compromised the claim against him.⁶ Where the company assumes the defense of an action and conducts it negligently, to the loss of the employer, it is liable to him for the loss sustained.⁷

¹ *Wollman v. Fidelity & Casualty Co.*, 87 Mo. App. 677.

² *Fidelity & Casualty Co. of New York v. Lone Oak Cotton Oil & Gin Co.*, 35 Tex. Civ. App. 260, 80 S.W. 541 (carpenter employed to install machinery in a cotton oil mill); *Hoven v. Employers' Liability Assurance Corp.*, 93 Wis. 201, 67 N.W. 46 (policy covering operations connected with business of iron and steel works embraces construction of building for use of employer in business).

³ *Home Mixture Guano Co. v. Insurance Co.*, 176 Fed. 600.

⁴ *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 162 N.Y. 399, 56 N.E. 897.

⁵ *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co.*, 130 Fed. 957.

⁶ *St. Louis Dressed Beef, etc., Co. v. Maryland Casualty Co.*, 201 U.S. 173, 26 Sup. Ct. 400.

⁷ *Attleboro Mfg. Co. v. Insurance Co.*, 171 Fed. 495.

The stipulation that the insuring company shall be liable for only those damages with which the employer may be charged after a compliance with the law would of itself point toward nonliability where a person was employed contrary to statute, though the employer might be himself liable. Policies containing a provision that the company is not liable for injuries to children employed in violation of minimum age laws therefore allow no recovery in case such an illegally employed person is injured, though judgment runs against the employer.¹

The states of Illinois² and South Carolina³ have laws looking to the formation of mutual insurance companies by employers, with a view to affording members insurance or indemnity in cases of loss on account of accidents occurring in connection with their business. The Illinois law restricts membership to persons engaged in the same class of manufacturing or mining, and requires not less than twenty incorporators.

SECTION 98. *Insurance of Employees.* — A law of Maryland⁴ provided for coöperative insurance, in the form of a fund to which steam and street railway companies, owners of mines and quarries, and municipalities engaged in sewer construction and similar work might contribute according to a fixed scale adjusted to the nature of the employment. An amount equal to one half the payments might be withheld from the wages of the employees after notice. The resulting fund was to be administered by the insurance commissioner of the state, only cases of accidental death being provided for by the payment of a uniform sum. The law contained a provision that contributors to the fund were

¹ Mt. Vernon Woodberry Duck Co. v. Insurance Co., 111 Md. 561, 75 Atl. 105; Frank Unnewehr Co. v. Insurance Co., 176 Fed. 16, 99 C.C.A. 490.

² R.S., ch. 73, secs. 309, *et seq.*

³ Acts 1903, No. 40.

⁴ Acts 1902, ch. 139.

to be exempt from all other forms of liability, thus depriving the employee of his right of action for damages either at common law or under the statutes of the state; and on this ground the law was held to be unconstitutional.¹

A later law of the same state² undertakes to provide a co-operative insurance plan for coal and clay miners in certain counties of the state. Employers and employees are to make equal contributions to a fund which is to be collected and held by the treasurers of the counties. Administration devolves on the county commissioners. Fixed amounts are named for compensation in cases of death, of maiming of various described kinds, for injuries not resulting in maiming, and for medical and burial expenses. Suits for damages may be brought, but doing so bars compensation rights, and, conversely, the acceptance of compensation bars the right to sue. A somewhat similar law has been enacted by the legislature of Montana,³ applicable to workmen, laborers, and employees in and around coal mines and coal washers, excepting office employees, superintendents, and general managers. Insurance under this law is mandatory, the funds to be provided by deductions from the wages of all employees coming within its provisions, and by fixed payments by the employers based on the amount of coal mined per month. The fund is to be administered by the state treasurer. Injured employees or their representatives may sue to recover damages independently of the provisions of the act, but the commencement of a suit of this nature will operate as a forfeiture of the right to benefits under the act.

¹ *Franklin v. United Railway & Electric Co.*, Ct. of Common Pleas of Baltimore, opinion filed Apr. 27, 1904.

² Acts 1910, ch. 153 (p. 484).

³ Acts 1909, ch. 67.

Of broader scope, covering in fact the principal lines of industrial employment, is the workmen's insurance law of Washington¹ which requires all employers in designated industries, classed as "extra-hazardous," to pay into a state accident fund certain amounts as premiums. These premiums are based on the nature of the employment and the number of workmen therein, and constitute a fund from which payments are to be made to workmen suffering from injury caused by accident occurring in the course of employment. Employers in other industries than those designated may elect to adopt the provisions of the insurance law, whereupon they are relieved from other liability. The legislatures of Massachusetts² and Ohio³ have enacted laws of similar general import with that of Washington, though not compulsory, and applicable to all classes of employers who accept their provisions. In Ohio, the classification of risks and the fixing of premium rates are committed to a state liability board, which is charged with the administration of the law generally, while in Massachusetts a state industrial accident board administers the law. While employers may exercise their choice in accepting the provisions of the statute, if they fail to do so, they are liable for damages resulting from injuries to their workmen, and cannot offer as defenses either assumption of risks, fellow-service, or contributory negligence. The Massachusetts act was pronounced constitutional in an advisory opinion of the supreme court of the state,⁴ in which were considered both the abrogation of the common law defenses and the adoption of the voluntary insurance scheme as a substitute for liability.

¹ Acts 1911, ch. 74.

² Act approved July, 28, 1911.

³ Act approved June 15, 1911.

⁴ Opinion delivered July 24, 1911.

CHAPTER VIII

WORKMEN'S COMPENSATION LAWS

SECTION 99. *Federal Compensation Law of 1908.* — The British law of employers' liability, both as construed by the courts of England in common law actions and as enacted in the legislation of 1880, has been of large influence in directing the course of action in this country, both legislative and judicial. At the present time, the principles that control in the United States are of comparatively small and diminishing importance in Great Britain, on account of the adoption in that country in 1897 of a compensation act by virtue of which the injured employee secures, not a right of action for damages, but a grant of compensation payable by the proprietor of the business in which the employee was injured. This principle, generally adopted by more than a score of the industrial countries of the world, received recognition to a limited extent by an act of Congress of May 30, 1908,¹ which grants to "any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or in the management and control of the same,

¹ Acts 1907-1908, ch. 236 (35 Stat. 556).

or in hazardous employment under the Isthmian Canal Commission," compensation for injuries received in the course of his employment not due to his own negligence or misconduct. The amount of compensation is the rate of pay that would have been received by the employee if he had continued to be employed, this point being determined altogether by the employing office. This provision of the law gives the injured employee the benefit of any increase affecting employees of his group and class during the continuance of his compensation payments. Payments continue during disability, but for a period limited to one year from the beginning of the disability caused by the injury. In case the injury results in death, the widow, child or children under sixteen years of age, or a dependent parent, are entitled to compensation of the same amount as would have been payable to the employee if he had survived. No compensation is provided unless the injuries cause disability for more than fifteen days. Claims must be filed within a "reasonable time," the statute limiting the time for filing death claims to not more than ninety days after the death on account of which the claim is made. Injured persons receiving compensation must be examined as often as directed by the Secretary of Commerce and Labor, at least once every six months. In practice this examination is sometimes waived where the disability is obviously permanent, but the effect of the provision is usually to limit approvals of claims to six-month periods, subject to extension on a proper showing at the expiration of the period. Where a person is only partially incapacitated, and is able to do light work, but not to resume the duties of his regular employment, it has been held that the claim for compensation may be approved for the period of a year, even though there may be some

employment during the time, inasmuch as he is entitled to a year's wages at the old rate, and is therefore entitled to the protection of such an approval.

The administration of the act is committed by the act itself to the Secretary of Commerce and Labor, who is authorized to make necessary rules for the award and payment of the benefits accruing under its provisions. He is also authorized to determine all questions of negligence or misconduct, so that the law is practically removed from the field of litigation, its construction by the Secretary on the points most frequently causing dispute not being subject to judicial review. The doctrine of assumed risks is absolutely eliminated, as is the defense of fellow-service, the trade risk falling on the beneficiary of the undertaking, where it would seem properly to belong in every instance; and no employee is held accountable for the misconduct of a fellow, of whose actions he is often inevitably ignorant, and over whom he has usually no power of control, even indirectly.

The sundry civil bill for the year 1912 (act of March 4, 1911, Public, No. 525), extended the benefits of this law to all employees under the Isthmian Canal Commission, eliminating the question of hazardous employment, and provided that the administration of the law in its application to such employees should devolve upon the chairman of the Commission. It also extended the time for filing death claims to one year.

In administering the law, a liberal construction has been adopted, following in general the definitions and rulings of the common law as to the terms "artisan or laborer," "course of employment," "negligence or misconduct," and "dependence," but relaxing in a measure the rule as to what should be con-

sidered negligence of such nature as to bar a claim, with a view to carrying out the evident beneficial intent of the act. Illegitimate children are held to be entitled to the benefits of the statute, as it is not one relating to inheritance, and the statute uses the term "child or children" in an unqualified and presumably in a popular sense, as offspring. Trade diseases, as lead poisoning, do not support a claim for compensation, since the idea of the word "accident" is held to imply a more definite point of time than would be the case where cumulative effects are the results of causes operating through a long period. Still less can compensation be allowed for cases of illness caused merely by exposure during employment,¹ though an edema of the lungs caused by inhaling smoke from a blast in a tunnel, and an ulcerated sore throat resulting from the inhalation of acid fumes while repairing an acid tank, were held to be injuries entitling to compensation; so also of sunstroke; and of the freezing of a workman's feet while employed in an exposed place; and of the aggravation of a chronic appendicitis by a strain or blow, leading to disability which had not existed prior to the accident causing the injury; and in a case of disability caused by a sprain accompanied by a rupture of the synovial sac surrounding the ligaments of the wrist, induced by repeated operations under conditions causing unusual effort in the performance of work, it was held that "within the language of the statute, an employee may be injured in the course of his employment without having suffered a definite accident."² An error of judgment or the display of ignorance in procuring or following medical advice is not a bar to the receipt of compensation.

¹ 28 Opinions of the Attorney-General, p. 254.

² 27 Opinions of the Attorney-General, p. 346.

Presumptions are in favor of the claimant, as where injury occurred in the performance of work under conditions not usually attended by untoward circumstances, but which in the particular case involved injury. A person with a preëxisting weakness suffering injury from an accident that would not presumably injuriously affect a sound man is entitled to compensation notwithstanding his predisposition, if the accident was the actual proximate cause of the disability. This extends to the case of a workman who is in a place of danger in the course of his employment, and is affected by epilepsy, to which he is subject, and is injured, the disease being nothing more than a remote cause; while the position of hazard that makes the fall dangerous, as from a height, or into a fire, is a condition of employment, and the injury is therefore one that was entitled to compensation. An employee engaged as laborer does not lose his status because of the fact that at the moment of the accident causing his injury he is employed at other than strictly laborer's work; while a messenger or other employee may be detailed to work of such nature as to bring him within the scope of the act. Employees of contractors of the government are not employees of the United States.¹

The course of employment includes going upon ways or conveyances furnished or maintained for the purpose of going to and from work. One injured by a blast at the place where he was due to begin work within a few minutes was present in the scope of his employment, as was one who was on his way home by the usual route at the close of work and was injured at another place than that of his own labor; so also an employee injured by the negligent act of another, while the former was

¹ Following *United States v. Driscoll*, 96 U.S. 421.

performing the required duty of "ringing in" at the time clock, was entitled to compensation.

The payments being compensatory in their nature are not to be regarded as gratuities; if therefore an injured employee submits a claim but dies before it is passed upon, the compensation payable for the term of his disability may be paid to his personal representatives, since it is a right which survives him, and does not die with him as does a right to a gratuity.¹ Surviving beneficiaries must, of course, submit a separate claim for the period subsequent to the death, terminating with the year for which payments are provided.

The above construction follows in some measure the interpretation put upon the British compensation act, where appropriate; and while the compensation afforded is often entirely inadequate, as in cases of maiming, permanent disability, and loss of life, by a liberal regard for the fair intendment of the act, a very considerable measure of relief is furnished to a class of employees who were otherwise practically without redress.

The idea of compensation had already received recognition in the case of members of crews of life-saving or lifeboat stations, who, if disabled by wound or injury received or disease contracted in the line of duty, may receive full pay during one year, and, on approval by the Secretary of the Treasury, during a part or all of a second year;² also in the case of railway mail clerks injured while on duty, who continue to receive pay during one year if the disability lasts so long. The personal representatives of railway mail clerks killed while on duty, or dying

¹ XVI Decisions of the Comptroller of the Treasury, 477.

² Act of May 4, 1882, 22 Stat. 57.

within one year thereafter as a result of injury received while on duty, receive the fixed sum of two thousand dollars.¹

SECTION 100. *State Statutes.* — With the exception of the coöperative insurance law of Maryland (sec. 98), the state of Massachusetts was the first of the United States to enact legislation looking toward the substitution of compensatory payments in lieu of actions for damages.² The law provides for a submission to the state board of conciliation and arbitration of such schemes or plans as may be proposed by employers as substitutes for the system of liability existing at common and statute law; payments are to be based on a percentage of the average earnings of the employees. When any scheme is approved by the board, the employer may make contracts with his employees for his release from liability at law by the payment of the proposed compensation. It is not permitted to an employer to make the employee's assent to such a scheme obligatory as a condition to securing employment. It is obvious, however, that the employer is not obliged to either accept or retain any employee; and that while the employer would not, under the circumstances, assign as a reason for the workman's nonemployment his unwillingness to enter into the contract, it might in fact be the controlling reason, which the employer is not at all obliged to disclose.³

While this state was the first to arrange by statutory enactment for a scheme of compensation, the first laws embodying and enacting such a scheme were passed by the legislature of

¹ Act of May 12, 1910, 36 Stat. 363. Prior to this date the sum of \$1000 had been paid; see appropriation act, Act of April 21, 1902, 32 Stat. 115, and subsequent appropriation acts.

² Acts 1908, ch. 489.

³ *Adair v. United States*, 208 U.S. 161, 28 Sup. Ct. 277.

New York.¹ The first statute amends the former liability law of the state, chiefly by making any person exercising control or command a vice-principal as to those under his direction, and by making the employer liable for injuries to the employees of a contractor where injury results from conditions within the control of the original employer. Restrictions are also placed on the use of the defenses of assumption of risks and contributory negligence. This statute then proceeds to enact a compensation scheme, the acceptance of which is optional with employers and employees, as an alternative to the rights and liabilities existing at common law or provided in the state liability law.²

¹ Acts 1910, chs. 352, 674.

² The compensation scheme involves the payment of death claims in an amount equal to twelve hundred times the employee's daily earnings, where dependents survive, and proportionately reduced amounts if there are only partial dependents. If no dependents survive, medical and burial expenses in an amount not exceeding one hundred dollars are to be paid. In cases of nonfatal accidents resulting in total incapacity, one half the average weekly earnings are to be paid during disability not exceeding eight years. For partial incapacity the payment is to be equal to one half the difference between the earnings before and after the injury. Payments shall in no case exceed ten dollars per week, and medical examinations may be held from time to time at the employer's expense to determine the continuance and degree of disability.

Employers and employees accepting the scheme are to signify the fact by signing and filing an instrument to that effect with the same formalities as if making a conveyance of real estate, the agreement to continue in force during the continuance of the employment contract unless canceled by sixty days' notice in writing by either party. The agreement relieves the employer from liability under common or statute law unless the injury was due to his failure to obey an order of the commissioner of labor as to provisions for safety or to his serious and willful misconduct. The bringing of a suit cuts off all claim to compensation under the plan, and no right accrues where the injury is due to the serious or willful misconduct of the person injured. Questions arising under the compensation plan may be settled by agreement, by arbitration as provided by the code of civil procedure, or by an action at law. The action at law is to be in the form

The acceptance of the provisions of the second law was made obligatory where they applied. This statute involves a consideration of the power of the legislature to enact a law compulsorily shifting the burden of the risk of industrial accident from the employee to the industry itself, and requiring fixed measures of relief or compensation for resultant injuries to be administered by the employer without reference to his personal fault or negligence. Where only an optional or elective provision exists, both parties being free to choose, it is a matter of agreement or contract and within the power of the parties, unless this exercise of their rights is shown to be contrary to public policy. A compulsory statute, however, must show proper justification for its enactment as a matter of public welfare within the police power of the state. Prior decisions tending to support such a law exist. Thus it has

of a suit on breach of contract, and the award, if in the claimant's favor, shall be a lump sum covering arrears and prospective payments. No assignment or attachment can affect weekly payments due under the plan, nor will a claim for an attorney's fee be enforceable unless the amount is approved in writing by a justice of the supreme court or by the justice of the court in which the case was tried. The payments rank as preferred claims against an employer's assets, the same as unpaid wages for personal services. Railroads are exempted from the operation of the compensation statute, and no injury causing disability of less than two weeks' duration is to be considered.

The second act (ch. 674) provided a compulsory compensation scheme for designated dangerous employments, *i.e.*, the construction or demolition of bridges or buildings where iron or steel framework is used, and the operation of elevators, derricks, or hoists for the conveyance of materials in connection therewith; work on scaffolds twenty or more feet in height in the construction, alteration, repair or painting of buildings or bridges; work involving danger from electrically charged wires; work involving the use of explosives as an instrumentality of the industry; railroad employments, including maintenance of way; the construction of tunnels and subways; and all work carried on under compressed air. The details as to compensation and administration are practically the same as in the case of the elective statute.

been held that legal liability may be charged even in the absence of fault, thus practically making the manager of a business an insurer of the safety of his customers, as in the case of a railroad company and persons transported by it.¹ Statutes are constitutional that modify or abrogate the defenses of fellow-service, assumed risks, and contributory negligence.² Such legislation may go so far as to give the employee a status that is briefly described in some statutes as being the same as if he had not been an employee.³

The validity of legislation adapted to the particular character of the undertaking has already been noted,⁴ and the hazardous nature of an employment is clearly recognized as warranting the regulation of its working conditions by a measure of legislative interference with the common law freedom of contract of the employer and employee.⁵ It is clear, however, that a compensation law cannot be said to address itself in any direct manner to the question of the physical conditions of employment, and that any indirect effect, as by stimulating employers to care in order to lighten the probable burdens of a compensation provision, could not bring the law within the class of safety regulations.

The first case to come before the courts under the statute in

¹ *Chicago, R. I. & P. R. Co. v. Zerneck*, 59 Nebr. 689, 82 N.W. 26; same case, 183 U.S. 582, 22 Sup. Ct. 229; *Chicago, B. & Q. R. Co. v. Wolfe*, 187 U.S. 638, 23 Sup. Ct. 847.

² *Howard v. Illinois C. R. Co.*, 207 U.S. 463, 28 Sup. Ct. 141 (dissenting opinion, and cases cited); *El Paso & N. E. R. Co. v. Gutierrez*, 215 U.S. 87, 30 Sup. Ct. 21; *Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431.

³ Mass., Acts 1909, ch. 514, sec. 127; Me., Acts 1909, ch. 258.

⁴ Sec. 90.

⁵ *Missouri P. R. Co. v. Mackey*, 127 U.S. 205, 8 Sup. Ct. 1161; *Tullis v. R. Co.*, 175 U.S. 348, 20 Sup. Ct. 136; *Holden v. Hardy*, 169 U.S. 366, 18 Sup. Ct. 383.

question (the law providing compulsory compensation in certain dangerous employments), was one of injury to a railroad employee without fault charged to either the injured employee or the employer, but merely as a necessary risk of the employment. In the trial and appellate courts the act was held to be constitutional, the court stating that the legislature thereby undertook merely to shift the burden of the trade risk from the employee to the employer, which was said to be within its power.¹ On appeal to the court of appeals of the state, however, the law was declared unconstitutional. The cogency of the economic and equitable reasons was recognized, but it was held that under existing restrictions on legislative action, it was impossible constitutionally to enforce a law of this nature, charging the employer with liability for accidents resulting from no fault of his own, thus taking his property without due process of law.²

Laws following the principles of the elective law of New York are found in other states.³ For employers who do not accept the compensation act, but stand on the principle of liability, the act may provide that the defenses of fellow-service and assumed

¹ *Ives v. South Buffalo R. Co.*, 124 N.Y. Supp. 920.

² *Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431. It is of interest to note in this connection that the court, while recognizing the force of the economic argument in favor of the compensation law, yet concluding that it could not validate the act under consideration, was traversing the same ground over which the courts have frequently gone seeking reasons to justify the exception to the rule of respondeat superior that is presented in the fellow-servant doctrine, though these courts reached the conclusion that the economic argument was adequate. See sec. 78; also opinion Mass. Sup. Ct., July 24, 1911, on insurance bill.

³ Cal., Act of April 8, 1911; Ill., Act of June, 10, 1911; Kans., Act of March 13, 1911; N.H., Act of April 15, 1911; N.J., Act of April 4, 1911; Wis., Act of May 3, 1911.

risks shall be abrogated, and a rule of comparative negligence enacted; while in New Jersey the defense of contributory negligence is done away with entirely. Instead of making the loss of these defenses conditional, they may be restricted or abrogated absolutely, by amendment of the liability law, as in California, New Hampshire, and New York.

The State of Nevada has a compulsory compensation law,¹ applicable to a rather comprehensive list of employments designated as "especially dangerous." The employee has his choice of a claim under the compensation act or a suit for damages, the employer being deprived of the defenses of fellow-service and assumption of risks, while that of contributory negligence is restricted. Contracts exempting the employer from his obligations under the act are prohibited, but claims may be settled by compromise after the injury has been received.

¹ Act approved March 24, 1911.

CHAPTER IX

NEGLIGENCE OF EMPLOYEES

SECTION 101. *The Liability of Employees for their Negligent Acts.* — An employee is liable to his employer for damages caused by his negligence or misconduct in the performance of his work,¹ a provision which is embodied in the Field Codes.² The burden of proving that the damage was caused by such negligence or misconduct is on the employer,³ and if the employer's failure to furnish suitable tools, materials, or appliances concurred with the employee's lack of care or skill in causing the damage, no recovery can be had.⁴

It has been disputed whether an employee can recover damages against a fellow-servant for negligence causing injury,⁵ but the better doctrine is to the effect that he can;⁶ and clearly, no sufficient reason appears why a man should be relieved from liability for his misconduct merely because its victim is one who is in the same employment with himself, such liability resting

¹ *Mobile, etc., R. Co. v. Clanton*, 59 Ala. 392, 31 Am. Rep. 15; *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475.

² Cal., Civ. Code, sec. 1990.

³ *Newton v. Pope*, 1 Cowen 109 (N.Y.).

⁴ *Wilder v. Stanley*, 49 Vt. 105.

⁵ *Albro v. Jaquith*, 70 Mass. 99, 64 Am. Dec. 56; *Stevens v. R. Co.*, 1 Ohio Dec. 335.

⁶ *Hinds v. Overacker*, 66 Ind. 547, 32 Am. Rep. 114; *Hare v. McIntire*, 82 Me. 740, 19 Atl. 453; *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437 (overruling the *Albro* case, *supra*); *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 33 Atl. 237; *Brower v. N. P. R. Co.*, 109 Minn. 385, 124 N.W. 10.

on the common law obligation to so conduct one's self as not to injure another, and not on any contract relation.

A number of states have laws providing for penal proceedings against employees who are negligent in the discharge of their duties to the injury of third persons. The common law provides for such liability generally, but the statutes in question fix stated penalties for certain classes of offenses.¹ These relate most frequently to employees of common carriers, both by land and water, often with varying penalties for negligence and gross negligence,² or for negligence endangering life and for that causing actual loss of life.³ Willfully damaging live stock or other property, or unnecessarily frightening teams is also made a ground for punishment.⁴ In some jurisdictions, similar laws exist relating to operators of steam boilers or other machinery,⁵ or even to persons in charge of animals.⁶

The question of requiring bonds from employees as a safeguard against the results of their negligence is taken up by a law of Massachusetts,⁷ by which common carriers are forbidden to require of their employees any bond or other security against the consequences of the employee's negligence except a bond to account for money or other property. A statute of New Mexico looks only to the prohibition of the requirement of bonds by foreign bonding companies, and forbids employers to charge a fee

¹ Ga., Pen. Code, sec. 115; Kans., G.S., secs. 2007, 2008; N.Y. Con. L., ch. 40, secs. 1052, 1891, 1892; Mass., Acts 1906, ch. 463, Pt. II, secs. 243, 244; N. Dak., R.C., secs. 8821, 8822, 8993, 8994.

² Mass., N.Y., N. Dak.

³ Ala., Code, secs. 7666, 7807, 7808, 7810; Vt., P.S., sec. 4508.

⁴ Ill., R.S., ch. 38, sec. 191.

⁵ Ariz., Pen. Code, sec. 308; Cal., Pen. Code, sec. 368; Minn., R.L., secs. 4886, 4889; N.Y., Con. L., ch. 40, sec. 1893.

⁶ Minn., R.L., sec. 4886.

⁷ Acts 1909, ch. 514, sec. 24.

for bonds against loss from the acts of an employee against such employee's wages unless the company writing the guarantee maintains an office in the territory.¹

A specific form of negligence adverted to by the laws of a majority of the United States is the intoxication of employees.² These laws relate in most instances to the employees of common carriers, and have regard to the welfare and safety of the public as well as of fellow-servants. A law prohibiting intoxicated persons to enter or be in any mine, smelter, machine shop, or sawmill³ doubtless has regard less directly for the interests of the public. In a number of states an employer who is a common carrier is subject to a fine if he hires or retains in his service persons of intemperate habits.⁴ The statute may also declare him liable in damages by reason of any injury caused by such employment,⁵ which is, however but a statement of the common law controlling in such cases. The employee may also be declared liable for all damages incurred or produced by reason of his intoxication during employment;⁶ or, if he causes injury to person or property by reason of such intoxication, he may be fined or imprisoned.⁷

SECTION 102. *Liability of the Employer to Third Persons.* — The doctrine of respondeat superior, *i.e.*, that one is responsible for the acts of his agents, operates to give third persons a right of action against the employer as principal, as well as against

¹ C.L., secs. 2141, 2142.

² Ariz., Pen. Code, sec. 356; Conn., Acts 1907, ch. 267; Ind., Acts 1907, ch. 272, sec. 3; Miss., Code, sec. 1350.

³ Wyo., Acts 1909, ch. 32.

⁴ Cal., Polit. Code, secs. 2932, 2933; Mich., C.L., sec. 6284; Ohio, Gen. Code, sec. 9005.

⁵ Vt., P.S., sec. 4506.

⁶ Mich., C.L., sec. 6285.

⁷ Vt., P.S., sec. 4507; Conn., Acts 1907, ch. 267; Ind., Acts 1907, ch. 272.

the negligent actor, where an injury is received on account of the negligence of an employee.¹ To give ground for the action against the employer the relation of employer and employee must exist at the time of the act giving rise to the claim, though the acts of one rendering service, however trivial, or for however short a time, and even if without being requested so to do by the person served, if done with his knowledge, or with his assent, express or implied, will make him liable in damages to third persons injured by such acts.² The degree of liability is, of course, only such as the employer would have incurred if he had done the act himself; and since the doctrine is an exception to the broader rule that every one is answerable for his own acts, its limits are in fact carefully guarded, being in general restricted to specifically authorized acts,³ or those done in line of duty and for the benefit of the employer, since beyond the scope of his employment the employee has no more claim upon his employer than has any other person,⁴ but within this scope the employer is liable even though the act is willful and wanton.⁵

The liability is the consequence of the negligent character of the act causing it, and it is no defense to the employer that he was careful in choosing his employees, or had no notice of their incompetency.⁶ If the act was done in the course of employment and in the furtherance of the employer's business, it is no

¹ *Farwell v. Boston W. R. Co.*, 4 Metc. 49 (Mass.); *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. 637; *Chesapeake & O. R. Co. v. Dixon*, 179 U.S. 131, 21 Sup. Ct. 67.

² *Hill v. Morey*, 26 Vt. 178; *Althorf v. Wolfe*, 22 N.Y. 355.

³ *Lynch v. Metropolitan E. R. Co.*, 90 N.Y. 77, 43 Am. Rep. 141.

⁴ *Marier v. R. Co.*, 31 Minn. 351, 17 N.W. 952; *Phelan v. Stiles*, 43 Conn. 426; *Medlin Milling Co. v. Boutwell (Tex.)*, 133 S.W. 1042.

⁵ *Jones v. Seaboard Air Line R. Co.*, 150 N.C. 473, 64 S.E. 205; *Wallace v. John A. Casey Co.*, 116 N.Y.S. 394.

⁶ *Minot v. Snavely*, 172 Fed. 212 (C.C.A.).

defense that the act itself was specifically prohibited.¹ Thus where a salesman loaded a gun in a store at the request of a customer, though protesting that it was against his employer's instructions, a resultant injury to a bystander was held to be chargeable to the employer because of the purpose of the act, which was in no sense to serve the negligent employee, but only to effect a sale for his employer.² The same rule has been enforced where the injurious act was obviously unauthorized, as the forcible taking of an article of property to secure the payment of fare,³ or the use of undue violence in carrying out an order,⁴ such acts having been committed in the exercise of the general power intrusted to the employee by the employer.

An employer may ratify a wrongful act of his employee, as by accepting benefits procured by the acts of which the wrong was an incident, and thus become liable therefor to the injured person.⁵ The mere fact of the retention of an employee after the commission of the wrongful act does not amount to a ratification thereof,⁶ though it is said that to retain and promote an employee with a knowledge of his tortious acts is some evidence of such ratification.⁷ It has been held that, where the injury is caused by acts in the nature of slander or libel, it is not sufficient to show that the servant was at the time

¹ *Western Real Estate Trustees v. Hughes*, 172 Fed. 206 (C.C.A.); *Philadelphia & R. R. Co. v. Derby*, 14 How. (55 U.S.) 468.

² *Garretzen v. Duenkel*, 50 Mo. 104, 11 Am. Rep. 405.

³ *Ramsden v. R. Co.*, 104 Mass. 117, 6 Am. Rep. 120.

⁴ *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Steamboat Co. v. Brockett*, 121 U.S. 637, 7 Sup. Ct. 1039; *Tillar v. Reynolds* (Ark.), 131 S.W. 969.

⁵ *Simon v. Bloomingdale*, 81 N.Y. Supp. 499, 39 Misc. 847; *Dempsey v. Chambers*, 154 Mass. 330, 28 N.E. 279.

⁶ *International, etc., R. Co. v. McDonald*, 75 Texas 41, 12 S.W. 860.

⁷ *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

in the service of his employer or acting within the scope of his employment; but direct authority to speak the actionable words, or their subsequent approval and ratification must also be shown.¹

Both master and servant may be held responsible for injuries, either to strangers² or to other employees;³ and a nonresident corporation cannot procure a separation of a joint action so as to avail itself of the right of removal of the case from a state to a federal court.⁴ The law of one state directs that in actions for damages against an employer, when the injury is the result of the negligence of a co-employee of the person injured, such negligent employee shall be named in the verdict.⁵ If the liability of the employer is based solely on the rule of respondeat superior, and not any participation by him in the negligent or wrongful act, it has been held that the employer's liability in such a case is separate and distinct from that of the employee, and not joint, and that therefore a nonresident employer's case might be transferred to a federal court;⁶ but the contrary rule is fixed as the practice of the Supreme Court.⁷ Where an employer has been subjected to the payment of damages on account of the wrongful act of his employee, in a case in which he is not jointly liable, he may recover the sum paid in an action against the employee,⁸ though it must appear clearly that the latter was guilty of negligence, to support such a recovery.⁹

¹ *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 182, 121 S.W. 1026.

² *Hewett v. Swift*, 85 Mass. 420.

³ *Fort v. Whipple*, 11 Hun. 586.

⁴ *Chesapeake & O. R. Co. v. Dixon*, 179 U.S. 131, 21 Sup. Ct. 67; *Alabama G. S. R. Co. v. Thompson*, 200 U.S. 206, 26 Sup. Ct. 161.

⁵ *Minn., R.L.*, sec. 4179.

⁶ *Warax v. Cincinnati, etc., R. Co.*, 72 Fed. 637.

⁷ *Chesapeake & O. R. Co. v. Dixon*, *supra*; *Alabama G. S. R. Co. v. Thompson*, *supra*.

⁸ *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647.

⁹ *Brannan v. Hoel*, 15 La. Ann. 308.

CHAPTER X

SUNDRY STATUTES

SECTION 103. *Liability of Employers for Taxes of Employees.*

— An incident of the relation of employer and employee that is purely statutory is a provision of the laws of a few states that makes employers liable for taxes levied on their employees,¹ usually poll and road taxes. By these statutes the employer may be required to pay such taxes and recoup himself from the wages owing to or earned by them. The Pennsylvania statute² refers to alien employees only, but covers all taxes payable by them. Falling short of such requirements, but looking toward the same end are laws directing employers to furnish the names of employees to assessors, road overseers, etc.³ Such laws go to quite an extreme in the matter of charging employers with the duties devolving on the public officers of the state, and are of at least doubtful validity, burdening employers with the discharge of a quasi public function from which other persons in like situation in every respect except that they are not employers are free;⁴ nor does the duty fall equally on employers, especially

¹ Cal., Polit. Code, sec. 2671; Ga., Polit. Code, sec. 549; Idaho, R.C., sec. 908; La., Acts 1902, No. 213; N. Mex., Acts 1907, ch. 96; Wash., Acts 1903, ch. 119; Wyo., Acts 1905, ch. 52.

² Acts 1897, No. 108.

³ Ark. Dig., sec. 5355; Cal. Pen. Code, sec. 434; Colo., A.C., sec. 3957; N.C. Rev., sec. 5201.

⁴ County Com'rs v. Aspen Mining Co., 3 Colo. App. 223, 32 Pac. 717.

in the case of the Pennsylvania statute, and it seems probable that the law of that state would fall under the same condemnation as did the statute taxing employers of alien labor. (See sec. 56.)

In case of a judgment for taxes rendered against a delinquent workman, the obligation devolving on the employer is in the nature of a garnishment, and he is liable for the payment of such taxes if and only if he is indebted to the employee at the time the notice is served, or becomes indebted thereafter.¹

SECTION 104. *Profit Sharing by Employees.* — Two states have laws containing special provisions authorizing corporations to arrange for admitting employees to an interest in the profits of the business. In one of these² the method is simply a grant of power to the board of directors to distribute to the employees such portion of the profits as it may deem just and proper; in the other instance,³ provision is made for the issue of special stock to employees, such stock to be held only by them. The value of such stock is limited, and the proportion to the total value of the capital restricted; the payment of dividends thereon is also regulated. These laws are of but little interest, since they are not essential to the practices indicated, which are much more common than is the legislation.

SECTION 105. *Pensions for Employees.* — The law of Pennsylvania regulating corporations contains a section⁴ which declares that corporations for profit may grant allowances or pensions to employees who have become old or infirm during service. Like the laws mentioned in the foregoing section, this law is of

¹ Kootenai County v. Hope Lumber Co., 13 Idaho 262, 89 Pac. 1054.

² Conn., G.S., sec. 3342.

³ Mass., R.L., ch. 110, secs. 37-39.

⁴ B. P. Dig., p. 424, sec. 106.

no particular value, the practice being comparatively widespread and entirely independent of statutory regulations.

SECTION 106. *Coöperative Associations*. — A number of states have special laws providing for the formation of coöperative associations for profit.¹ So far as productive associations are concerned, it is the intention of these laws to provide for the coöperation in industrial undertakings of groups of persons associated in corporate form to manage a business in which the labor shall be furnished largely or exclusively by the members themselves. Provision is made against the concentration of stock or of power, either by declaring that members shall hold but one share each of the stock, or by limiting the value of the stock one member may hold; voting power is also restricted.

SECTION 107. *Workmen's Trains*. — One state has a statute requiring every railroad having a terminus in its principal city to operate not less than two workingmen's trains each way daily.² The hours of arrival and departure and the rates of fare are fixed by the statute. The number of trains may be increased by the board of railroad commissioners on petition.

The object of securing reduced rates of transportation for workmen at certain hours of the day may also be gained by provisions in the articles of incorporation of street railways, or by city ordinances; and where the ordinance requires such service within the city limits, the extension of the bounds of the city will operate to extend the application of the ordinance, where the same charter is effective.³

¹ Conn., G.S., secs. 3992-4001; Ill., R.S., ch. 32, secs. 103-127; Kans., G.S., secs. 1454-1456; Mass., R.L., ch. 110, secs. 7, 69, 70; N.J., G.S., pp. 894-896.

² Mass., Acts 1906, ch. 463, Pt. II, sec. 188.

³ *People v. Detroit United Railway*, 162 Mich. 460, 125 N.W. 700.

SECTION 108. *Employment Offices.* — Agencies having for their object the placing of applicants for employment or the furnishing of employees to persons seeking workmen are regulated by statute in many states, the large amount of fraud and of abuse of confidence being held to justify such action. The state itself has undertaken to render this service in a number of jurisdictions, appropriating sums of money for the maintenance of bureaus of information and registration for both workmen and employers.¹ These offices are usually under the direction and management of the state labor commissioner, and are recognized as a proper form of state activity. The service is without charge to either party, and must be uniformly rendered without discrimination between persons engaged in or seeking legitimate employment. Thus a law forbidding the furnishing of lists of applicants for employment to employers whose workmen are on strike² was declared unconstitutional as unlawfully discriminating between employers having employees who had gone on strike, possibly without justifiable cause, and other employers; also between workmen applying for situations with employers whose men are not on strike and workmen whose applications were not so restricted.³ In other words, it was an attempt to enact a law not affording the equal protection to the citizens of the state that is required by the fourteenth amendment.

The regulations affecting privately managed employment agencies may require merely a registry of the agency and the

¹ Conn., G.S., secs. 4608, 4609, Acts 1903, ch. 33; Ill., R.S., ch. 48, secs. 53 to 60; Mich., Acts 1907, No. 281; Ohio, Acts 1904, p. 101, etc.

² Ill., Acts 1899, p. 268.

³ *Matthews v. People*, 202 Ill. 389, 67 N.E. 28.

payment of a tax or license fee ;¹ or they may contain the added requirement of good character of the applicant for license ;² or of a bond conditioned that the applicant shall conduct his agency properly and pay damages resulting from misconduct.³ They may, on the other hand, prescribe minutely the conduct of the business,⁴ as by fixing or limiting the amount of the fee to be charged, or prohibiting the making of any charge in advance of the furnishing of information or assistance to the applicant, or forbidding the division of the fees with employer. Failure to secure or retain a position by the assistance of the agency may be made grounds for a demand for a return of a part or all of the fee paid. The sending of applicants for labor to places of an immoral character is frequently prohibited in laws of this class, and the location of the office of the agent in or in communication with any place in which intoxicants are sold, or in connection with any restaurant or lodging house may be forbidden. The agent may be required to assure himself beyond a reasonable doubt as to the correctness of his statements, and the making of false statements be punished as a misdemeanor.

Laws of this nature are clearly restrictive of the citizen's right to carry on a lawful business, and as such their constitutionality has been challenged. They have been upheld by the courts, however, on the ground that they are within the police power of the state, exercised in behalf of the general welfare, and specifically to prevent fraud and immorality. "The leg-

¹ Tenn., Acts 1907, ch. 541, sec. 4 ; Ky., Acts 1904, ch. 33 ; Nev., C.L., sec. 1187.

² Va., Code App., secs. 128, 129.

³ La., Acts 1894, No. 58 ; Idaho, Code, secs. 658, 659.

⁴ D.C. (U.S.), 34 Stat. 304, 848, 35 Stat. 641 ; Cal., Sims' Penal Code, p. 582 ; Ill., R.S., ch. 48, secs. 61, 62 ; N.Y., Con. L., ch. 20, secs. 170-189 ; Pa., Acts 1907, No. 90 ; N. J. Acts 1907, ch. 230 ; Ohio, Gen. Code, secs. 886-896.

islature has the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information,"¹ and the evils of imposition and extortion that are known to have been practiced by private agencies warrant their regulation by statute.² A provision limiting the amount of charges was held unconstitutional in a California case,³ the language used by the court being such as to suggest its disapproval of the entire law. The better opinion is, however, clearly in their favor.

A few states require emigrant agents, *i.e.*, agents undertaking to procure employees for labor outside the state of residence, to pay a tax for the privilege of transacting such business, not so much, apparently, by way of regulation as for the sake of discouraging it entirely. Such at least would seem to be a natural inference from a tax rate of five hundred dollars for each county in which the business is carried on,⁴ or even of one hundred dollars;⁵ while a rate of one thousand dollars per county⁶ could hardly receive any other interpretation. No license is necessary where the hiring is done by the employer himself or by his agent solely for him.⁷ The validity of this class of laws, as taxing laws, was upheld in a case arising under the tax law of Georgia of 1898, which fixed the rate at five hundred dollars for each county in which the agent wished to operate. The contentions that the act restricted the right of a citizen to

¹ *People ex rel Armstrong v. Warden*, 183 N.Y. 223, 76 N.E. 11.

² *Price v. People*, 193 Ill. 114, 61 N.E. 844; *State v. Napier*, 63 S.C. 60, 41 S.E. 13.

³ *Ex parte Dickey*, 144 Cal. 234, 77 Pac. 924.

⁴ Fla., G.S., sec. 476; Ga., Acts 1907, p. 25.

⁵ N.C., Revisal, sec. 5108.

⁶ S.C., Acts 1907, ch. 259.

⁷ *Watts v. Commonwealth*, 106 Va. 851, 56 S.E. 223.

move from one state to another, impaired the natural right to labor, and was class legislation without a reasonable basis, were all disallowed by the Supreme Court;¹ nor would this court impute prohibitive intent to the law. The courts of states having laws of this class follow this decision,² which itself was in affirmation of a case decided by the supreme court of Georgia.³

In this connection may be mentioned statutes of a few states forbidding superintendents, foremen, and others who employ and discharge workmen, to ask for or receive fees or gratuities for giving employment or continuing employees in service.⁴

SECTION 109. *Bureaus of Labor.*—Offices exist in most of the United States as a part of the administrative force of the state, whose duty it is to collect industrial statistics, investigate conditions of employment, inspect factories and other work places, administer and enforce the laws enacted for the protection of labor, and seek to improve the condition of manual laborers in general. The heads of such bureaus or offices are usually known as commissioners, and are sometimes appointed by the governor and sometimes elected by popular vote. The work of factory inspection, mine inspection, the enforcement of child and woman labor laws, the mediation and conciliation of labor disputes, and the conduct of free public employment offices are some of the administrative duties with which the commissioners of labor may be charged in the various states. In the

¹ Williams v. Fears, 179 U.S. 270, 21 Sup. Ct. 128.

² State v. Napier, *supra*; State v. Roberson, 136 N.C. 587, 48 S.E. 595.

³ Williams v. Fears, 110 Ga. 584, 35 S.E. 699.

⁴ Conn., G.S., sec. 4698; Fla., G.S., sec. 3743 (employment of longshoremen); Mont., Acts 1907, ch. 52; Nev., Acts 1909, ch. 25; Pa., B. Dig., p. 457, sec. 85; Utah, Acts 1909, ch. 52.

carrying out of this work they may be required to prosecute employers and proprietors who disregard the statutes or the orders of the commissioners and their inspecting force; they may also be required to defend in actions brought by persons who feel themselves aggrieved by such statutes or orders. It is only in this indirect connection therefore that bureaus of labor call for mention here, the laws which they enforce having been already noted under their respective heads.

The National Bureau of Labor is charged with the administration of no laws, its functions being investigatory only; the single exception to this rule lies in the fact that the administration of the federal compensation act (see sec. 99) is delegated in large part to this bureau by the head of the Department of Commerce and Labor, to whom the statute is by its terms committed for enforcement. The Commissioner of Labor also acts with a member of the Interstate Commerce Commission or of the Court of Commerce designated by the President, in efforts to mediate in labor disputes affecting interstate common carriers. (See sec. 128.)

CHAPTER XI

TRADE AND LABOR ASSOCIATIONS

SECTION 110. *Nature.* — Associations of workingmen, whether members of single trades or of wider industrial groups, are the result of a purpose to procure for their members benefits that are conceived to be better obtainable by concerted action than by individuals acting singly. Such associations operate by way of agreement, each member giving over in part his own freedom of action to the will and choice of the organization in exchange for the benefits and protection proposed to be derived from his membership therein. To the extent of the scope of such agreements they operate as a restraint on the free action of the individual in disposing of his own labor, and in a resultant degree, on the free course of employment.

Efforts to better the conditions of employment, including the subjects of wages, hours of labor, shop rules, and the personnel of the working force, are uniformly held to be lawful by the courts of this country, and the fact of combination in nowise affects the fact of lawfulness, although the power of the associated members is far greater than the mere sum of the individual forces comprising the association, and though there is a measure of restraint on trade.¹ With the exception of a very few early and entirely repudiated cases, this has always been the

¹ *Master Stevedores' Ass'n. v. Walsh*, 2 Daly 1 (N.Y.); *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Union P. R. Co. v. Ruef*, 120 Fed. 102; *National Protective Ass'n. v. Cummings*, 170 N.Y. 315, 63 N.E. 369; *Arthur v. Oakes*, 63 Fed. 320, 11 C.C.A. 209; *Hopkins v. U.S.*, 171 U.S. 578, 19 Sup. Ct. 40.

rule in the United States, while in many states, and by federal enactment, the lawfulness of labor associations is declared by statute;¹ special provisions may also be made for their incorporation.²

This broad statement as to the legality of associations and agreements must be qualified as soon as the conduct of third persons is made the subject of regulation or attempted regulation,³ since one man's rights end where another's begin, though at what point this line is to be drawn has been the subject of numerous divergent opinions;⁴ nor can a man lawfully bind himself irrevocably to a surrender of his own choice and will. In other words, the voluntary character of the association must be maintained, and excessive fines or forfeitures to compel the observance of membership agreements cannot be enforced at law, even against the party making them.⁵ The preservation of

¹ Cal., Acts 1903, ch. 289; Colo., A.S., sec. 1295; N.Y., Con. L., ch. 40, sec. 582; Pa., B. P. Dig., p. 484, secs. 72, 73.

² Iowa, Code, secs. 1642, 1643; La., R.L., sec. 677, Acts 1890, No. 50; Mass., R.L., ch. 125, secs. 13-16; U.S., 30 Stat. 424, Comp. St., p. 3204.

³ U.S. v. Debs, 63 Fed. 436, 64 Fed. 724, 65 Fed. 210; *In re Debs*, 158 U.S. 564, 15 Sup. Ct. 900; *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301; *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753.

⁴ The general principle seems to be well expressed in a case (*Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297), in which a nonunion employee was suing to recover damages for his discharge made in pursuance of an agreement that only union men should be employed. In this case the court said: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions."

⁵ *Martell v. White*, 185 Mass. 255, 69 N.E. 1085; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *Willcut & Sons Co. v. Bricklayers' Ben. P.U.*, 200 Mass. 110, 85 N.E. 897; *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003.

a reasonable degree of liberty of action on the part of the members of organizations, other workmen, employers, and the public generally would appear to be the fundamental obligation which combinations of the sort under consideration should be required to meet.¹ The fact is not overlooked in this connection that

¹ In the case of *Martell v. White*, cited above, a voluntary association of granite manufacturers had agreed to limit their business transactions to members of the association, under a penalty not to exceed five hundred dollars. Martell, a quarryman, who was not a member of the association, complained of loss of trade by reason of the agreement. Members of the association had in fact dealt with him until the enforcement of penalties caused them to cease. The trial court ruled that Martell had no ground of action, but on appeal it was held that though the end sought, *i.e.*, the advancement of the business interests of the members, was not illegal, the fact that there was arbitrary and artificial interference with the choice and acts of the members of the association, afforded sufficient grounds to support an action. The coercive system of fines, enforced by a tribunal not legally constituted, even though assented to in the original agreement, was held to result in illegal restraint, used as it was to enforce a right, not absolute, but conditional, and inconsistent with the conditions upon which the right rests. The case of *Boutwell v. Marr* was cited in this case, the circumstances having been quite similar. In the *Boutwell* case the court said: "The law cannot be compelled, by any initial agreement of an associate member, to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims."

While the above cases are not those of combinations of workingmen, the principles of the *Martell* case were directly applied to a labor organization seeking to enforce a strike order by fines on members unwilling to leave their employment (*Willcutt & Sons Co. v. Bricklayers, etc.*, *supra*); to a case in which a labor union sought to enforce a fine against an employer of some of its members for not giving all his work to union workmen (*Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287: the fine was paid, but the court allowed *Carew* to recover it, as no one has the right, "either alone or in combination with others to disturb or annoy another either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace." See also *March v. Bricklayers' and Plasterers' Union*, 79 Conn. 7, 63 Atl. 291); and to a case in which a member was ordered to pay a fine for

there is "an undoubted, and, from the practical standpoint, probably unassailable determination of the state to diminish the natural inequality of capital and labor, by prohibiting combinations of capital and permitting combinations of labor."¹ But legislative expression of this intent does not authorize interference with the lawful business of employers,² or with the conduct of workmen who may not choose to become or remain members of labor organizations.³ The right of action for damages for interference with business or employment is therefore not precluded by statutes expressly legalizing labor combinations;⁴ and a law attempting to absolve from liability of this sort would doubtless be declared unconstitutional. So that though labor agreements are in some respects legalized in a sense in which capitalistic agreements are not, and assuredly in a sense quite in contrast to the status of such agreements under the prohibitive statutes of Great Britain in force at the begin-

alleged violations of union rules (*Brennan v. Hatters*, 73 N.J.L. 729, 65 Atl. 165: *Brennan* was held not to be obliged to pay the fine or submit to the order of the union to give up his place for a year, since an original agreement to submit to such discipline, even if made, would be contrary to public policy and therefore void. See also *Schneider v. Local Union No. 60*, 116 La. 270, 40 So. 700; *More v. Bennett*, 140 Ill. 69, 29 N.E. 888).

¹ Tiedeman, *State and Federal Control of Persons and Property*, p. 423; *per contra*, Eddy on Combinations, secs. 894-897.

² *Old Dominion S.S. Co. v. McKenna*, 30 Fed. 48; *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806; *Pierce v. Same*, 156 Cal. 70, 103 Pac. 324; *Farmers' L. & T. Co. v. N. P. R. Co.*, 60 Fed. 803; *Arthur v. Oakes*, 63 Fed. 310; *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301.

³ *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297; *People v. Smith*, 5 N.Y. Cr. 509; *People v. Walsh*, 6 N.Y. Cr. 292; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 N.J. Eq. 49, 46 Atl. 208; *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894; *Lucke v. Clothing Cutters*, 77 Md. 396, 26 Atl. 505.

⁴ *Frank v. Herold*, 63 N.J. Eq. 443, 52 Atl. 152; *Curran v. Galen*, *supra*; *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603; *Purvis v. United Brotherhood*, 214 Pa. St. 348, 63 Atl. 585.

ning of the last century, they are yet necessarily controlled by the same general principles of law as are associations of capital,¹ and more particularly associations of employers.² It is therefore not permissible, in a study of trade or labor associations, to overlook any point as to the form, nature, purpose, or methods of the organization that would be pertinent in examining other combinations, though the effect of special statutes and of court decisions will necessarily receive attention.

SECTION 111. *Status*. — The powers of an incorporated union are such as are given to it by its charter, and any member, as a party in interest to the acts and undertakings of the society, may call upon the courts to compel the observance by it of its charter provisions.³ It may be enjoined,⁴ and adjudged guilty of contempt for the violation of an injunction, and fined therefor, as any other corporation.⁵ Such a body cannot, however, procure an injunction against a rival organization to prevent its own disruption by persuasion or other means calculated to cause its members to abandon the complaining organization; since its threatened dissolution gives it no grievance on its own account, and any interference with the rights or conduct of the members is a matter for their own consideration and action.⁶

The ordinary incidents of corporate existence attach where a

¹ *Loewe v. Lawlor*, *supra*; *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S.W. 918.

² *Atkins v. Fletcher Co.*, 65 N.J. Eq. 658, 55 Atl. 1074; *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962.

³ *Flaherty v. Longshoremen's Ben. Soc.*, 99 Me. 253, 59 Atl. 58.

⁴ *Casey v. Typographical Union*, 45 Fed. 135; *Cœur d'Alene Consol. Min. Co. v. Miners' Union*, 51 Fed. 260.

⁵ *Franklin Union v. People*, 220 Ill. 355, 77 N.E. 176; *Master Horseshoers' Ass'n v. Quinlivan*, 83 App. Div. 459, 82 N.Y. Supp. 288.

⁶ *Silver State Council No. 1 v. Rhoades*, 7 Colo. 211, 43 Pac. 451.

labor organization procures its incorporation; these include the power to sue and be sued, and its legal and financial liability to the extent of its funds for its corporate acts and proceedings, being represented, as are other corporations, by properly designated and authorized boards or officials.¹ What has been said as to exceptional treatment of labor organizations finds illustration in this connection, since such bodies are permitted to incorporate, while the laws governing corporate action generally are made inapplicable to labor unions by special provisos. Such exemptions occur in the enactments known as anti-trust laws,² in insurance laws,³ and in the Federal statute providing for the taxation of corporations.⁴ That these laws are discriminatory in favor of organized labor as against other forms of organizations probably no one would care to dispute, and it has been broadly intimated that provisions of this sort are unconstitutional,⁵ while on the other hand, a clause exempting labor unions from the provisions of an anti-trust law has been declared constitutional.⁶

Though the incorporation of labor organizations is thus permitted, or even encouraged, they are for the most part unincorporated, and are frequently described as voluntary associations as distinguished from partnerships on the one hand and from incorporated bodies on the other. Though they require the payment of an initial sum on entrance, and of periodical

¹ *Franklin Union v. People*, *supra*.

² La., Acts 1892, No. 90, sec. 8; Mich., C.L., sec. 11382; Mont., Pen. C., sec. 325; Nebr., C.S., sec. 5343a, etc.

³ Mass., Acts 1909, ch. 514, sec. 30.

⁴ Act of Aug. 6, 1909, 36 Stat. 113.

⁵ *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190; *In re Grice*, 79 Fed. 627; *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S.W. 918.

⁶ *Cleveland v. Anderson*, 66 Nebr. 252, 92 N.W. 306.

dues, they are not thereby constituted associations with a capital stock; and not being conducted for profit, they are not in general subject to the regulations of law applicable to business associations, incorporated or otherwise.¹

Such bodies have at common law no legal status or authority, ranking with merely social organizations, so far as rights and powers are concerned.² The charter, so-called, of such an association is not granted by the state, but by a superior organization, and is rather a certificate of affiliation than a charter. The identity of an organization depends on its individual membership and their mutual agreements rather than on any charter or certificate of affiliation, so that the latter can be changed without affecting the organization as an entity.³ It conveys no property rights, but is a basis for such agreements as persons wishing to become members are supposed to make, and is binding to the extent at least of making conformity thereto obligatory under penalty of loss of membership.⁴ The nature of such organizations is in part the result of the mutual agreements of the members among themselves on the basis of such charter and the constitution and by-laws, which are construed as being contracts between the members,⁵ thus giving rise to a quasi corporate organization; and it is in part the result of a joint interest

¹ *Burt v. Lathrop*, 52 Mich. 106, 17 N.W. 716; *St. Paul Typothetæ v. Bookbinders' Union*, 94 Minn. 351, 102 N.W. 725.

² *In re Higgins*, 27 Fed. 443; *St. Paul Typothetæ v. Bookbinders' Union*, *supra*; *Mayer v. Journeymen Stone Cutters*, 47 N.J. Eq. 519, 20 Atl. 492; *Barbour v. Albany Lodge*, 73 Ga. 474; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631.

³ *Shipwrights', etc., Association v. Mitchell*, (Wash.), 111 Pac. 780.

⁴ *O'Brien v. Musical Protective Union*, 64 N.J. Eq. 525, 54 Atl. 150.

⁵ *Brown v. Stoerkel*, 74 Mich. 269, 41 N.W. 921; *Hammerstein v. Parsons*, 38 Mo. App. 333; *Hyde v. Woods*, 94 U.S. 523; *Screwmen's Ass'n v. Benson*, 75 Texas 555, 13 S.W. 380.

of the members in any funds or property accumulated by the association or by its agents or trustees, which, together with the fact that there is no responsible entity formed by incorporation of any sort, leaving the individual members answerable for the debts and acts of the association, gives to such associations at least some of the aspects of a partnership.¹ The rule as to partnership funds is also applicable, so that where an action is brought against an unincorporated association, its funds will be exhausted before the property of individual members is attached.²

The cases above cited are mainly those in which the rights of nonmembers were affected. The case is different when persons in the relation of fellow-members, bound by mutual agreements, raise questions within the association; and where the property of the association has been the subject of litigation between members it has been held that the laws applicable to corporations come into play.³ In the Barrett case the court went so far as to deny altogether that a voluntary association not for profit partakes of the nature of a partnership,⁴ though this may be regarded as a result of an exclusive consideration of the point in issue, which was the right of a withdrawing member to retain a portion of the union funds which was at the time

¹ *Karges Furniture Co. v. Amalgamated Woodworkers*, 165 Ind. 421, 75 N.E. 877; *Atkins v. Fletcher Co.*, 65 N.J. Eq. 658, 55 Atl. 1074; *Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938; *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155; *Patterson v. District Council*, 31 Pa. Super. 112; *Rhode v. United States*, 38 Wash. L. R. 26, 34 App. D.C. 249.

² *Inbusch v. Farwell*, 66 U.S. 566; *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354.

³ *Niblack on Societies*, 221; *Local Union No. 1, Textile Workers v. Barrett*, 19 R.I. 663, 36 Atl. 5; *Rhode v. United States*, *supra*.

⁴ See also *Richmond v. Judy*, 6 Mo. App. 465; *Brown v. Stoerkel*, *supra*; *St. Paul Typothetæ v. St. Paul Bookbinders' Union*, *supra*.

in his hands. The court ruled that there was no partnership interest in any member giving him a right to any share, proportionate or otherwise, in the funds or property of the association. "He has merely the use and enjoyment of it while a member, the property belonging to and remaining with the society," a view which is clearly correct, though it involves the imputation of a measure of corporate rights to a voluntary association. In the strict application of the common law rule, however, voluntary associations of this nature cannot be recognized in their collective capacity and name as having any legal existence apart from their members; they cannot, therefore, sue nor be sued, and it has been held that if incapacity is pleaded, an injunction will not lie against such an association,¹ and that no judgment will lie against an unincorporated union even though it has answered as defendant;² though the court held in the latter case that an injunction would properly issue against a trade-union by name, and would operate to restrain all members who had knowledge of it.³ It was held on appeal in the Allis-Chalmers case that where an action has been begun as against an association, and an answer has been made on behalf and in the name of the association, the question of incompetency not being raised, proceedings had will bind the association, and no question of incompetency will be heard on appeal.⁴ The question

¹ *Karges Furniture Co. v. Amalgamated Woodworkers*, 165 Ind. 421, 75 N.E. 877; *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753.

² *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155.

³ See also *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631; *Jonas Glass Co. v. Glass Bottle Blowers' Ass'n.*, 72 N.J. Eq. 653, 66 Atl. 953; *In re Debs*, 148 U.S. 564, 15 Sup. Ct. 900; *American Steel & Wire Co. v. Wire Drawers*, 90 Fed. 608, and cases there cited.

⁴ *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631; *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 404, 83 N.E. 932.

is inevitable also as to the effect of the violation of an injunction issued against an association, and in what form punishment for contempt can be directed against the organization; and it appears that the rule that no judgment will lie against an unincorporated body would necessarily give way when that body has disregarded an order of the court directed specifically to it. As the punishment of an association considered in its corporate nature can be strictly only by a fine, the property of the association would first come under the hand of the court in the satisfaction demanded;¹ but on account of the partnership nature of voluntary associations, the members' property may be attached, on a proper showing,² or the members and officers imprisoned, where the punishment is for contempts or criminal acts,³ since the law will not be placed in the position of pronouncing penalties upon an abstraction such as an intangible organization, leaving the members free to disobey the orders of the court with impunity.

In the absence of statutes fixing the capacity of an unincorporated association it has been held in many cases that actions may be had by or against the members as individuals only, who may sue or be sued either by joining all of them, or one or more for all, if the numbers make it impracticable to join all.⁴ In the case last cited it was stated that the rule generally followed in Massachusetts requires the members to be individually

¹ Barnes & Co. v. Chicago Typographical Union, *supra*.

² Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938; Patterson v. District Council, *supra*; Branson v. Industrial Workers of the World, *supra*.

³ U.S. v. Debs, 64 Fed. 724; *In re* Debs, 158 U.S. 564, 15 Sup. Ct. 900.

⁴ Allis-Chalmers Co. v. Iron Molders' Union, 150 Fed. 155; Cieland v. Anderson, 66 Nebr. 252, 92 N.W. 306; St. Paul Typothetæ v. Bookbinders' Union, *supra*; Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753.

joined in suits at law, while in equity proceedings representative members may be taken for a numerous class.

On the other hand are the cases already cited in which the union was regarded as an entity, and as such held liable in damages. In this view, damages may be assessed against an organization in an action against it alone,¹ or against a union as a joint wrongdoer with a designated person or persons;² and a nonsuit was upheld by a federal judge in a case where the plaintiff sought to recover damages for a violated contract of an unincorporated society against four members who were sued "individually and for themselves and for others, officers and members of the unincorporated association."³

The matter may be settled by legislation authorizing the bringing of actions at law or suits in equity by or against unincorporated associations having some distinguishing name or designation by such title;⁴ or by a law authorizing one of a number of persons jointly concerned as plaintiffs or defendants to appear for all.⁵ A law of the former class,⁶ granting the

¹ *Purvis v. Brotherhood of Carpenters and Joiners*, 214 Pa. St. 348, 63 Atl. 585.

² *Wyeman v. Deady*, 79 Conn. 414, 65 Atl. 129 (Deady was the business agent of the union); *Branson v. Industrial Workers of the World*, *supra*.

³ *Ehrlich v. Willenski*, 138 Fed. 425, citing *Ash v. Guie*, 97 Pa. 493, 39 Am. Rep. 818; *Pain v. Sample*, 158 Pa. 428, 27 Atl. 1107. (This case evidently turned on a classification of the union as a beneficial society, coming under a statute of the state (B. P. Dig. p. 219, sec. 16) by which members of such societies were relieved from personal liability for the obligations of the society, which might be proper if a breach of contract only was under consideration, but which could hardly be fairly applicable in many cases where union activities were under consideration.)

⁴ Mich., C.L., sec. 10025; Conn., G.S., sec. 583; N. J., G. S., p. 2588; Vt., P.S., sec. 1448.

⁵ Ind., A.S., sec. 270 (see *Sourse v. Marshall*, 23 Ind. 194); Ohio, Gen. Code, sec. 11257 (see *Kealey v. Faulkner*, 18 Ohio S. & C. P. Dec. 498); Nev., C.L., sec. 3109 (see *Branson v. Industrial Workers of the World*, *supra*).

⁶ Mich., C.L., sec. 10025.

right of action against the organization without limiting the common law right to proceed against the members as partners, was held to be constitutional and applicable to a labor organization.¹ The action of the court in the case in which a nonsuit was granted on account of the action being brought against certain members of the union rather than against the union as a whole² would restrict recovery of damages in a civil action to the funds of the association, which corresponds to an action against a corporation. As pointed out in the note, *supra*, this view rests on a statute of the state of Pennsylvania.

As to the contracts of an unincorporated association, the individual members are liable at common law either because they held themselves out as agents of a principal that had no existence, or because they are themselves principals, since there is no other in existence.³ Part of the members cannot sue others on a contract of an association;⁴ or for tort on account of the negligence of one employed by the association, since any such person is as much the employee of the aggrieved party as of his associates.⁵ In this ruling the law of principal and agent is brought into view, which was formally held to apply in a case involving contracts between two unincorporated associations.⁶ The agency must be clearly made out, when a contract is the subject of action, since no individual member's liability will be presumed from the mere fact of association.⁷

¹ U.S. Heater Co. v. Iron Molders' Union, 129 Mich. 354, 88 N.W. 889.

² Ehrlich v. Willenski, *supra*. ³ Lewis v. Tilton, 64 Iowa 220, 19 N.W. 911.

⁴ McMahon v. Rauhr, 47 N.Y. 67.

⁵ Martin v. N.P.B. Ass'n., 68 Minn. 521, 71 N.W. 701.

⁶ St. Paul Typothetæ v. St. Paul Bookbinders' Union, *supra*, citing Ehrmantraut v. Robinson, 52 Minn. 335, 54 N.W. 188.

⁷ Richmond v. Judy, 6 Mo. App. 465. See also Lawlor v. Loewe, 187 Fed. 522 (C. C. A.).

Being voluntary associations, their maintenance and preservation or the continued membership therein of any individual is not a subject that the courts can undertake to direct or secure,¹ though members will be protected against improper expulsion or other action depriving them of valuable status or of property in union funds, tools, or other advantages.²

It is obvious that in many respects courts of equity are better adapted to the determination of the rights of such bodies and of persons in controversy with them, since their intangible nature and the frequent inaccessibility or nonexistence of association funds make proceedings against the persons of individuals the only method of enforcing rights, which is a method of procedure for which courts of equity are especially adapted, the judgments of law courts being generally enforced against a designated fund or object by proceedings *in rem*; there is, however, a growing tendency to sink the distinctions between the two forms of procedure. Under the English common law, an unincorporated association could not come into court for any redress whatsoever of collective grievances, since the granting of charters of incorporation was a jealously guarded function of the state, and no body of men could by associating themselves together without such a charter arrogate to themselves any of the functions of an entity independent of and apart from the individuals composing it.³ A treasurer might therefore embezzle the association funds with impunity.⁴ This has been made the subject of statutory provision, however, so that there

¹ O'Brien v. Musical M. P. & B. Union, 64 N.J. Eq. 525, 54 Atl. 150.

² O'Brien v. Musical M. P. & B. U., *supra*; Weiss v. Same, 189 Pa. St. 446, 42 Atl. 118; Steinert v. United Brotherhood, 91 Minn. 189, 97 N.W. 668; Cotton Jammers, etc., v. Taylor, 23 Tex. Civ. App. 367, 56 S.W. 553.

³ Lloyd v. Loring, 6 Ves. 773.

⁴ Erle, Trade Unions, p. 4.

is now a right in the members representing an association to proceed against a defaulting officer for the recovery of association property.¹ There is in the United States no question as to the right of an association not formed for illegal purposes to maintain an action for the recovery of its funds.²

SECTION 112. *Rules, By-laws, etc.* — The constitutions, rules, by-laws, or by whatever name called, the agreements accepted and entered into by the members of associations are contracts between themselves, and in so far as they are legitimate, will, on a proper showing, be enforced by the courts.³ While a degree of restraint of trade is involved in every agreement not to accept employment except under conditions conforming to a rule fixed by an association, this fact alone does not invalidate such rule, so far as internal administration is concerned, but the extent, purpose, and methods of enforcement of such agreements may bring them under the ban of the law. A man cannot enter into a valid contract to the injury of a third party or the prejudice of the public,⁴ and what an individual cannot lawfully do alone he cannot do by union with others, so that an agreement to surrender industrial freedom to an association is invalid and may vitiate the entire basis of an association's agreements.⁵ Thus an association was not allowed to enforce a fine against a member who had bid less for a piece of work than the rate fixed by the association of which he was a member, though the fine

¹ 31 & 32 Vict., ch. 116. See *R. v. Blackburn*, C.C.C., Dec. 17, 1868.

² *Snow v. Wheeler*, 113 Mass. 179; *Brown v. Stoerkel*, 74 Mich. 269, 41 N.W. 921; *Rhode v. United States*, 38 Wash. L. Rep. 26, 34 App. D.C. 249.

³ *Flaherty v. Portland Longshoremen's B. Soc.*, 99 Me. 253, 59 Atl. 58; *Brown v. Stoerkel*, 74 Mich. 269, 41 N.W. 921.

⁴ *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103.

⁵ *Kealey v. Faulkner*, 18 Ohio S. & C. P. Dec. 498.

was assessed in accordance with the rules; and this on the ground that while there was not an actual monopoly or control of the class of services involved, so far as the agreement went it was restrictive of competition, and subject to the same legal objection as a more extensive combination.¹ The court in this case went no further than to refuse to lend its aid in the collection of the fine, but a rule that prescribes the violation of contracts or a refusal to handle interstate commerce from a proscribed railway, or otherwise brings about a conflict with public policy, will not only not be enforced, but will be made the subject of judicial condemnation,² even to the extent of the dissolution of the offending association.³ It has been held that courts have no visitorial power to determine the reasonableness or otherwise of the rules of an association, the only question being as to whether or not they have been adopted according to the agreed methods of the body concerned;⁴ but it is obvious that this can relate only to the rules as such, and not to their enforcement or operation. If no property rights are involved, the enforcement of the rules will in general be left to the organizations themselves, and the courts will not intervene in such voluntary and personal matters as are usually involved in association arrangements;⁵ but where there are valuable rights, as of tools or other property, or benefit or insurance funds, or if

¹ *More v. Bennett*, 140 Ill. 69, 29 N.E. 888. See also *Bailey v. Master Plumbers*, 103 Tenn. 99, 52 S.W. 853.

² *Waterhouse v. Comer*, 55 Fed. 149; *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003.

³ *Kenley v. Faulkner*, *supra*.

⁴ *Green v. Felton*, 42 Ind. App. 675, 84 N.E. 166.

⁵ *O'Brien v. Musical P. & B. Union*, 64 N.J. Eq. 525, 54 Atl. 150; *Screwmen's, etc., Ass'n. v. Benson*, 75 Texas 555, 13 S.W. 380; *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla. 969, 43 So. 590.

privileges of employment are affected, the courts will see that the rules are strictly complied with for the protection of members in their rights thereunder; ¹ so also in regard to objections of members against acts alleged to be outside the scope and purpose of the organization as indicated by its regulations; and any member is entitled by his rights as such to call on the courts to enjoin a departure by the organization from its proper field of action.² Courts have also gone so far as to pronounce existing rules and by-laws inadequate to protect the members' rights, or unreasonable and void as determinative of a member's just rights.³

Not every rule that is unenforceable at law is, therefore, void, but the courts will say no more than that the persons party to such agreements are left to their own contracts, unless actually unlawful; and no legal sanction of such border line agreements, as, for instance, those in restraint of trade, will be given.⁴ Where the enforcement of such rules by a union is shown to work injustice upon a member, he may by repudiating his agreement, recover upon an independent ground of action, his agreement being contrary to public policy.⁵ And an employer's right to a free labor market will support his right to an injunction to prevent the enforcement of the rules of a labor organiza-

¹ *Steinert v. Carpenters and Joiners*, 91 Minn. 189, 97 N.W. 668; *Flaherty v. Longshoremen's Beneficial Soc.*, *supra*; *Brennan v. Hatters*, 73 N.J.L. 729, 65 Atl. 165; *Thompson v. Locomotive Engineers*, 41 Texas Civ. App. 176, 91 S.W. 834.

² *Flaherty v. Longshoremen*, *supra*; *Otto v. Journeymen Tailors*, 75 Cal. 308, 17 Pac. 217.

³ *People v. Musical M.P.U.*, 118 N.Y. 101, 23 N.E. 129; *Cotton Jammers', etc., Ass'n. v. Taylor*, 23 Texas Civ. App. 367, 56 S.W. 553.

⁴ *O'Brien v. Musical M.P. & B.U.*, *supra*.

⁵ *Brennan v. Hatters*, *supra*.

tion by means of fines and penalties against its members who may wish to continue in or to enter his employment.¹ It follows that rules and penalties directed against persons not members of the association are void, since no one can be required to purchase his freedom to earn a livelihood by submission to regulations imposed upon him by other than governmental agencies.²

It has occurred in actions against persons who were members or officers of labor organizations that the defense was offered that the acts complained of were done only as carrying out the rules and orders of the union. From what has been said as to the status and character of voluntary associations, it is apparent that such a defense could not be allowed, and the courts so hold,³ intimating broadly that the existence of rules prescribing such conduct as was made the ground of the action was in itself proof

¹ *Willcutt & Sons Co. v. Bricklayers' Union*, 200 Mass. 110, 85 N.E. 879; *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 Atl. 230; *Longshore Printing Co. v. Howell*, 26 Ore. 527, 38 Pac. 547.

² *March v. Bricklayers', etc., Union*, 79 Conn. 7, 63 Atl. 291; *Union P.R. Co. v. Ruef*, 120 Fed. 102; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327; *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753; *Burke v. Fay*, 128 Mo. App. 690, 107 S.W. 408. In the *March* case a penalty was assessed against a brick manufacturer who had sold bricks to an "unfair" boss mason, and subsequently to an employer of union labor. This latter employer was threatened with a strike unless he would guarantee the payment of the fine against *March*. This he did, and afterwards paid the fine, withholding the amount out of money due *March*, who then sued the union to recover the sum. In this he was successful, the court holding that the money was secured by threat, and not at all in the way of the adjustment of the terms of trade competition; though even this would not have justified the methods used to procure the payment of the money. See further, note, p. 215.

³ *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003 (*Buening*, as secretary of a liverymen's association ordered a hearse and carriages driven away from a funeral because the undertaker was not a member); *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607 (defendants withheld business from *Boutwell* on account of an agreement under penalty to deal only with members of the association).

of an illegal purpose. It may be said, therefore, that obedience to such rules, instead of being matter of defense, would rather be construed as an offense in itself, the rules being evidence of an unlawful purpose, as against public policy. The general limitation on rules of associations is succinctly stated in a case in which it was said that they must not be in violation of the laws of the land, or of any inalienable right of the members.¹

Where a labor organization has been enjoined from interfering with the employment of members of another, an act, the purpose and effect of which are to interfere with such persons, is a violation of the injunction, and the claim that such an act was performed merely as carrying out the rules of a voluntary association is no defense.²

SECTION 113. *Membership.* — The rights of members of labor organizations are necessarily chiefly controlled by the terms of agreement embodied in the constitutions and by-laws of the organizations themselves. The effect of such agreements and the limitations of members' rights thereunder have been considered in part in the foregoing section. Members will in general be held to look to the rules for their rights, and actions taken under such rules will not be interfered with unless there is proof of the violation of civil rights or of a failure of the organization to carry out the provisions of its own regulations.³ Expulsion is the extreme penalty enforceable by an organization of this class, the collection of coercive or penal fines not being favored on account of the restrictive features frequently contained in

¹ *Otto v. Journeymen Tailors*, 75 Cal. 308, 17 Pac. 217.

² *Chicago Federation of Musicians v. American Musicians' Union*, 139 Ill. App. 65.

³ *Screwmen's, etc., Ass'n. v. Benson*, 75 Tex. 555, 13 S.W. 380; *Otto v. Journeymen Tailors*, 75 Cal. 308, 17 Pac. 217.

the rules. It has been said that no mandatory injunction could properly issue to compel restoration to membership of one expelled from a society, as a party cannot be compelled by injunction to undo what he has done;¹ but the weight of authority is on the other side, and where the rules are shown to be inadequate to protect a member's rights,² or have not been complied with in due form,³ or if their enforcement would be against public policy,⁴ a mandamus will issue for a restoration to membership. This does not preclude the right to redress for damages shown to have accrued as the result of such improper expulsion, and the issue of the mandamus may be regarded as supporting the claim for such damages.⁵ Besides material interests, the standing and character of organized labor as affecting opportunities of employment may come into account in reckoning the value of membership in a labor organization.⁶ A member seeking restoration to membership will be required to exhaust the means of redress offered him within the organization before the courts will take cognizance of his alleged grievances;⁷ though this rule will not be enforced where damages are sought for the violation of property rights.⁸ Where loss of employment is caused by unlawful suspension, restoration by the union leaves the matter of damages open to trial at

¹ *Champion v. Hannahan*, 128 Ill. App. 387.

² *People v. Musical M.P.U.*, 118 N.Y. 101, 23 N.E. 129.

³ *Weiss v. Musical M.P.U.*, 189 Pa. St. 446, 42 Atl. 118; *Cotton Jammers', etc., Ass'n. v. Taylor*, 23 Texas Civ. App. 367, 56 S.W. 553; *Dingwall v. Association*, 4 Cal. App. 565, 88 Pac. 597.

⁴ *Schneider v. Local Union*, 116 La. 270, 40 So. 700.

⁵ *People v. Musical M.P.U.*, *supra*.

⁶ *Campbell v. Johnson*, 167 Fed. 102, 92 C.C.A. 554.

⁷ *Harris v. Detroit Typographical Union*, 144 Mich. 422, 108 N.W. 362; *St. Louis S. W. R. Co. v. Thompson*, 102 Tex. 89, 113 S.W. 144.

⁸ *St. Louis S.W.R. Co. v. Thompson*, *supra*.

law, and a statement by the union that it provides adequate means of redress will not prevent the court from taking the question under consideration and rendering judgment according to the whole evidence;¹ so also where the injured person takes an appeal within the union on the matter of improper procedure under the rules, since such an appeal cannot be construed as waiving one's legal right to damages resulting from the procedure of which complaint is made.² If the expulsion was procured by the interposition of a third party, such party may be joined as a defendant in an action for damages; but inasmuch as he alone could not have effected the expulsion, he cannot be held alone responsible therefor.³

It has already been pointed out that a member may obtain redress against a union, either where the rules have not been complied with or where they do not offer adequate redress for grievances resulting from injurious and unwarranted action by the union in its official proceedings; and that this may extend so far as to procure the dissolution of a union and the distribution of its funds on the complaint of members unfairly dealt with, on a showing that the basis of the organization is an illegal agreement in restraint of trade, the agreement being disaffirmed by the complaining members;⁴ the courts would, however, refuse to seek to secure any rights claimed by members within such an organization. Where the conduct complained of is that of an employee or agent of the association, no redress can be had by a member unless against the person guilty of the wrong complained of.⁵

¹ *Campbell v. Johnson*, 167 Fed. 102, 92 C.C.A. 554.

² *Blanchard v. District Council*, 77 N.J.L. 389, 71 Atl. 1131.

³ *St. Louis S. W. R. Co. v. Thompson*, *supra*.

⁴ *Kealey v. Faulkner*, 18 Ohio S. & C.P. Dec. 498.

⁵ *Martin v. N.P. Ben. Ass'n.*, 68 Minn. 521, 71 N.W. 701.

Applicants for membership must, of course, comply with the requirements prescribed for admission to such membership, and no one can demand admission as a right. On the other hand, an association can make no claim on anyone not a member on account of benefits for protection, so called, on the ground that it allowed him to work for a time on jobs on which its members were engaged, or on other grounds, since the right of employment is one of a free citizen, and does not depend on the approval of any association or body of men.¹ Representations made by applicants for membership are not necessarily guarantees, but are to be reasonably construed as expressions of the applicant's belief; as, for instance, where a workman declares himself able to command the average wages of his trade. Forfeiture of preliminary payments on the amount of the initiation fee, the return of which to a rejected applicant is conditioned on the correctness of the statements made by him in his application, is not warranted therefore on the ground that he was not finally regarded by the union as competent, though it was within their power to reject his application.² Representations must be in good faith, however, and the courts will decide matters of fact submitted to them in the course of controversy; fraud or falsity will be held by them as sufficient grounds for refusing assistance to an expelled member who is shown to be guilty thereof.³

While a member of a labor organization may join an outside person as defendant in a suit for damages for procuring his expulsion therefrom, he has as a matter of common law no recovery against an employer who may insist on his withdrawal from a

¹ *Levin v. Cosgrove*, 75 N.J.L. 344, 67 Atl. 1070.

² *Levin v. Cosgrove*, *supra*.

³ *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *Krause v. Sander*, 122 N.Y. Supp. 54.

union as a condition of employment, since it is a part of the freedom of contract of either party to make or refrain from such contracts on whatever grounds seem to them sufficient.¹ A number of states have undertaken to regulate this subject by statute, providing penalties against employers who make it a condition that their employees shall not become or remain members of labor organizations.² With practical unanimity this type of statute has been declared unconstitutional, as interfering with the rights of all men voluntarily contracting to make or continue their contracts in accordance with their own choice, so long as nothing injurious to the public interest is involved. Furthermore, such laws restrict the freedom of a certain class of individuals, and are held void as infringing on the rights of such persons in the formation of contracts.³ The sole exception to this view appears to be a ruling by an Ohio court that the law of that state was constitutional, since it did not interfere with the right to discharge, but only prohibited coercing or attempting to coerce an employee into quitting a union.⁴ Such a ruling leaves the law on the statute books, but takes away any practical effect it may have been assumed ever to have.

A certain protection of the rights of members in a collective

¹ *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *People v. Marcus*, 185 N.Y. 257, 77 N.E. 1073.

² Cal. Pen. Code, sec. 679; Conn., G.S., sec. 1297; Mass., Acts 1909, ch. 154, sec. 19; Ohio, Gen. Code, sec. 12943; Okla., Acts 1907-1908, ch. 513; U.S., 30 Stat. 428.

³ *Gillespie v. People*, 188 Ill. 176, 58 N.E. 1007; *Coffeyville Brick, etc., Co. v. Perry*, 69 Kans. 297, 76 Pac. 848; *State v. Julow*, 129 Mo. 163, 31 S.W. 781; *Commonwealth v. Clark*, 14 Pa. Super. Ct. 435; *State v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098; *Adair v. United States*, 208 U.S. 161, 28 Sup. Ct. 277.

⁴ *Davis v. State*, 30 Ohio Wkly. Law Bul. 342.

sense is attempted by a law of one state, which forbids the giving of bribes to officers or agents of unions for the purpose of securing the adjustment of labor disputes, or of influencing them in the performance of their duties as representatives of such organizations.¹

SECTION 114. *Collective Agreements.* — The principles governing contracts of employment considered in Chapter I are those that apply in cases of contracts between individuals; but in the development of organizations in industry, there has arisen a form of contract in which the parties are a labor organization or its representative on the one hand, and an employer or the representative of a group of employers on the other. These contracts concern themselves with wages, hours of labor, classification of employees, and, in fact, with all the conditions of employment. They may be said generally to attempt to provide for their own enforcement, by provisions for arbitration, the deposit of a forfeit, or otherwise without appeal to law. The legal construction of such contracts has not, therefore, been much discussed by the courts, and the cases available involve such a variety of elements that a general rule can hardly be deduced. The situation is further complicated by an apparent conflict of opinion as to the validity of such contracts as passed upon by the courts of different states. While their validity, *per se*, would seem to follow from the general law allowing freedom of contract and of association, the extent to which the parties thereto can go will be limited by the rule that no one can barter away his own freedom, or form monopolistic combinations or other contracts in violation of public policy; and an agreement involving enforcement by means of fines and penal-

¹ N.Y., C.L., ch. 40, sec. 380.

ties of a coercive nature will be considered as vitiated thereby.¹ Where there is no attempt to coerce third parties, however, such parties can make no effective attack on a collective agreement, even though its observance by the parties to it may reduce the opportunities of the third party for securing employment,² since the freedom of contract enjoyed by individuals extends to them in conjunction with others for the formation of united contracts on matters of common interest.³ Where the question lies between a labor union and one of its members who is unwilling to abide by the terms of his agreement, the rules and procedure of the union offer the natural and usually the only means of redress; though, as already stated, these rules must not interfere with the legal rights either of the employee⁴ or of the employer.⁵ But it must be a party in interest who raises the question of the legality of the contract; for though it may be invalid and unenforceable as overstepping rules of public policy, it requires more than a mere negative showing of such facts to lead to the intervention of the courts, since on such a showing the law takes the contract as it finds it, and as it finds it leaves it.⁶

In a recent case an injunction issued against the newly elected officers of a labor organization who sought to incite workmen to strike in violation of an existing contract, thus implying that

¹ Delaware, L. & W. R. Co. v. Switchmen's Union, 158 Fed. 541; Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C.C.A. 99; Hilton v. Eckersley, 6 Ell. & Bl. 47; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607; Martell v. White, 185 Mass. 255, 69 N.E. 1085.

² National Fireproofing Co. v. Mason Builders, 145 Fed. 260, 169 Fed. 259 (C.C.A.).

³ National Protective Ass'n. v. Cumming, 170 N.Y. 315, 63 N.E. 369.

⁴ Brennan v. Hatters, 73 N.J.L. 729, 65 Atl. 165.

⁵ Willcut & Sons Co. v. Bricklayers, 200 Mass. 110, 85 N.E. 897.

⁶ National Fireproofing Co. v. Mason Builders, *supra*, citing Brown v. Jacobs' Pharmacy Co., 115 Ga. 433, 41 S.E. 553.

the contract could be fairly assumed to secure to the employer valuable rights, even though no injunction would issue to prevent the workmen themselves from striking.¹ In another case, in which an employer was seeking to prevent a strike and offered in evidence a contract with the union, it was held that union officials could not be enjoined from counseling with the members of their unions, where no strike could take place without the favorable vote of the members themselves;² and in subsequent hearings in the Barnes case, the court refused to prevent union officials from counseling with or paying benefits to striking employees.³ The validity of a contract between an employer and a union was upheld by a divided bench where the point involved was the collection of a note given by the employer to guarantee his observance of the terms of the agreement;⁴ and a federal court directed the receiver of a railroad under its care to make an "appropriate contract" with an organization of railroad employees on the subject of the conditions of employment of its members.⁵

On the ground that the contract did not call for the employment of particular individuals, but only of individuals of a certain class, it has been held that the acts of employers and employees in terminating individual contracts could not be reviewed under the terms of a collective contract.⁶ It has also been held

¹ Barnes & Co. v. Berry, 156 Fed. 72.

² Delaware, L. & W. R. Co. v. Switchmen's Union, *supra*.

³ 157 Fed. 883, 169 Fed. 225, 94 C.C.A. 501.

⁴ Jacobs v. Cohen, 183 N.Y. 287, 76 N.E. 5 ("a regrettable decision," 41 Am. L. Rev. 203).

⁵ Waterhouse v. Comer, 55 Fed. 149 (but condemning and eliminating one rule).

⁶ Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S.W. 136; Barnes & Co. v. Berry, 157 Fed. 883; Delaware, L. & W. R. Co. v. Switchmen's Union, *supra*.

that such an agreement is not adequate to overcome the specific provisions of contracts made directly between employers and employees;¹ and a court refused to read into individual contracts with workmen the provisions of a contract with the union to which the men belonged, on the ground that the union was incompetent to contract for its individual members;² nor will an action for damages lie against an unincorporated union as a union for the breach of a contract made by it on behalf of its members, since it is not a legal person. The court declined to consider what would have been the result if the action had been brought against individual members. It went so far as to say, however, that if the members were in any way liable on the contracts of the association, the liability would rest on the doctrine of principal and agent and not on that of partnership, since the association had not at all the nature of a business enterprise and could not contract as such.

It is not easy to see, on what grounds actions could be brought against individuals under a contract the terms of which were not allowed to affect the conditions of their employment. The better view seems to be that of a case in which it was said that in so far as there was any real contract it must have been between individual members of the respective organizations.³ In this case the formal parties to the contract were the representatives of certain employers' and employees' associations respectively, and the court held that while the resultant contract was in form between two international associations, there were in reality separate contracts between employers and employees

¹ *Langmade v. Olean Brewing Co.*, 121 N.Y.S. 388.

² *Burnetta v. Marcelline Coal Co.*, *supra*.

³ *Barnes & Co. v. Berry*, 169 Fed. 225, 94 C.C.A. 501.

who were members of the various organizations; "or rather, that the provisions of the contract, upon its being entered into, became terms of the separate contracts of employment between each member of the Typothetæ [the employer's association] and the members of the union in his employ."

The legal value of an agreement of the sort under consideration is clearly very doubtful. The moral effect has been widely recognized, but the incorporation of penalty provisions adds little to that effect, since an inquiry into all the provisions and tendencies of such agreements has generally resulted in disclosing conditions with which the courts refuse to meddle; while the general rule of the unenforceability of labor contracts and the inequality of status that would result from binding an employer when the employee is free to abandon service, are obstacles to the granting of legal or equitable validity thereto. While an employer is at liberty to discharge a workman objectionable to the union without incurring liability to him for the act, the existence of such an agreement is no defense for the union in cases where it procures such discharge with no other justification than it purposed to procure his discharge as a punishment for his failure to make application for membership in the union.¹ If, however, he incurs suspension from his union, the agreement therewith for the exclusive employment of members in good standing is sufficient warrant for his discharge,² and the association would not be in any way liable in damages for procuring his discharge if his suspension was effected with proper regard for the by-laws of the association. It is not easy to conceive that a court of equity would order an employer who had contracted

¹ *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603; *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297.

² *Scarano v. Lemlein*, 121 N.Y.S. 351.

to employ only union men, to discharge a nonunion workman whom he had retained in violation of the terms of his agreement, or to hire union workmen furnished him by union officials, regardless of his opinion of their fitness. It would follow that a court of law would not enforce the payment of a note or other forfeiture conditioned on the observance of a contract of this sort; and the payment of a fine by an employer to settle a dispute following the alleged violation of a collective agreement is not conclusive, since the employer may be able to show to the jury in an action to recover the fine that there was coercion to procure its payment, so that recovery thereof may be allowed.¹

The steps that the parties themselves may take or the extent to which they may go in the way of strikes, lockouts, and boycotts for the procurement or enforcement of collective agreements will receive consideration in other sections.

SECTION 115. *The Closed Shop.* — The collective agreement usually embodies a so-called closed shop provision, restricting employment to members of the contracting labor organizations or of bodies affiliated therewith, or to persons not "objectionable to the union from any cause."² If it relates to employment on public works, such provision is condemned with practical uniformity, as making an unlawful discrimination, tending to create monopoly by the restriction of competition, and tending also to increase the cost of the work, which is against public policy and not within the power of the contracting board or

¹ *Burke v. Fay*, 128 Mo. App. 690, 107 S.W. 408, citing *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *March v. Bricklayers' etc., Union*, 79 Conn. 7, 63 Atl. 291. The opposite view was taken in *Jacobs v. Cohen*, *supra*; see also *Simers v. Halpern*, 114 N.Y. Supp. 163, in which it was held that such a note was not void for want of consideration.

² *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603.

officials.¹ There is a distinction allowed between public and private employment in this respect, as was brought out in the Toole case, cited above, in which the court said that "a contract between private persons may provide that it shall cease to be obligatory or be void if either party to it shall employ nonunion men, and the law will permit the provisions to have full force; and so with an inhibition against the hiring of union men and with all other stipulations which are not impossible of performance, not immoral, nor contrary to public policy." On this view a contract with an employer to retain in his service only members of the union which is party to the agreement is valid, so that no injunction against the discharge of nonunion members would lie; ² and indeed to hold otherwise would be to claim for the courts the power of supervising the conduct of employers

¹ *State v. Toole*, 26 Mont. 22, 66 Pac. 496; *Adams v. Brennan*, 177 Ill. 194, 52 N.E. 314; *Lewis v. Board*, 139 Mich. 306, 102 N.W. 756; *Atlanta v. Stein*, 111 Ga. 789, 36 S.E. 932; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S.W. 815. In this connection may be noted the ruling of the U.S. Civil Service Commission and the declarations of President Roosevelt in a case involving the rights of employees in the Government Printing Office. William A. Miller, a bookbinder, was expelled from his union, and, upon notice to the Public Printer, was discharged from his employment because of such expulsion. On appeal to the Civil Service Commission, his reinstatement was requested, since "the Commission does not consider expulsion from a labor union, being the action of a body in no way connected with the public service nor having authority over public employees, to be such a cause as will promote the efficiency of the public service." President Roosevelt thereupon ordered reinstatement, saying, "There is no objection to the employees of the Government Printing Office constituting themselves into a union if they so desire; but no rules or resolutions of that union can be permitted to override the laws of the United States;" and again, "In the employment and dismissal of men in the government service, I can no more recognize the fact that a man does or does not belong to a union as being for or against him than I can recognize the fact that he is a Protestant or Catholic, a Jew or a Gentile, as being for or against him." Twentieth Rep., U.S.C.S. Com., pp. 147-150.

² *Mills v. Printing Co.*, 91 N.Y. Supp. 185, 99 App. Div. 605.

and employees in the matter of the termination and formation of contracts of employment to an extent entirely unwarranted (sec. 3.), and the agreement can hardly be said to have had weight in influencing such a decision. A different case was presented where local associations of employers and employees had entered into an agreement for the employment of members of the employees' association only, and a discharged workman sued to recover damages for the loss of employment.¹ It was held that such a contract could not be supported, that it was no defense to the union that it was party thereto, and that the discharged employee could recover damages from the union for interfering to procure his discharge. The distinction was made by the judge in the Mills case between that case and the Curran case that the latter was an attempt to legalize a plan of compelling workmen not in affiliation with the organization to join it at the peril of being deprived of their employment. It was said that there is a manifest discrimination, well recognized, between a combination of workmen to secure the exclusive employment of its members by a refusal to work with none other, and a combination whose primary object is to procure the discharge of an outsider and his deprivation of all employment. In the first case the action of the combination is primarily for the betterment of its members; in the second case such action is primarily "to impoverish and crush another" by making it impossible for him to work there, or, so far as may be possible, anywhere. The difference is that which exists between a combination for the welfare of self and one for the persecution of another. The one may necessarily but incidentally require the discharge of an outsider; the primary purpose of the other is

¹ Curran v. Galen, 152 N.Y. 33, 46 N.E. 297.

such discharge and his exclusion from labor in his calling. This reasoning follows closely that of a concurring opinion in a case ¹ in which the method of procuring the closed shop was by strikes rather than by means of contracts with employers, and which sustained the right of the union to declare strikes in order to secure such an end, so that the discharged workman had no redress. The legality of closed shop contracts has been upheld in other cases on the ground in part that but a single employer was involved, so that workmen were not compelled to join the union in order to procure employment in the locality,² also that the contract was not procured by duress, nor was there pressure exerted "so imperative as to amount to compulsion" to procure the discharge of nonunion workmen.³

While the attitude of the courts of New York may therefore be said to be favorable to the closed shop agreement, those of Illinois seem to present a contrary view. Thus where a strike was ordered for the purpose of coercing an employer into signing such a contract, it was said that the attempt to thus procure the agreement was unlawful as violative of the clear legal right of the company and unjust and oppressive as to those who did not belong to labor organizations.⁴ Such agreements are also said to be unlawful as tending to monopoly by excluding work-

¹ *National Prot. Ass'n. v. Cumming*, 170 N.Y. 315, 334, 63 N.E. 369. The present writer has been entirely unable to discover the distinctions pointed out by the judges between the Cumming case and the Curran case. It was in evidence in the Cumming case that the agent of the union declared that if he ever found the plaintiff or his associates on a job in New York or vicinity, a strike would be called by order of the board of delegates; that he would not allow them to work on any job except a small, cheap job, and by his permission. See dissenting opinion concurred in by three judges, at p. 336 of 170 N.Y., p. 375 of 63 N.E.

² *Jacobs v. Cohen*, 183 N.Y. 287, 76 N.E. 5.

³ *Kissam v. Printing Co.*, 199 N.Y. 76, 92 N.E. 214.

⁴ *O'Brien v. People*, 216 Ill. 354, 75 N.E. 108.

men not members of the union.¹ And in the Massachusetts courts damages have been allowed as against members of a labor organization procuring the discharge, under a closed shop agreement, of a workman not belonging to the union which was party to the contract.² The ground on which such agreements are upheld is that they are beneficial to the employer, doing away with disputes; that they represent the expression of the interests of the workmen seeking employment on terms and under conditions agreed upon among themselves; that the acts of workmen in securing and enforcing such agreements are nothing more than trade competition, the purpose being to benefit the members of the union by securing them employment; and that if such is the purpose of the agreement and the acts thereunder, and not primarily to injure others, the agreement is defensible as a competitive measure, even though others are incidentally deprived of employment by reason thereof.³ In the case, *Berry v. Donovan*, cited above, it was held, however, that an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition. "The necessity that the plaintiff should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiff to be free from molestation, such as to bring the acts of the defendants under the shelter of trade competition." ⁴

¹ *Christensen v. People*, 114 Ill. App. 40; *Folsom v. Lewis*, (Mass.) 94 N.E. 316.

² *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603.

³ *National Prot. Ass'n. v. Cumming*, *supra*; *Kissam v. Printing Co.*, *supra*; *National Fireproofing Co. v. Mason Builders' Ass'n.*, 169 Fed. 259 (C.C.A.).

⁴ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011; see also *Folsom v. Lewis*, *supra*.

Under the rules laid down in the New York cases, an association of employers, covering practically the whole of a line of trade in a locality, cannot direct its members to employ only the members of a designated labor organization, though an individual employer might have such an arrangement; but such a restriction of employment would result from the action of a large and controlling organization as is contrary to public policy.¹ It follows that a bond given by a member of the association to secure compliance with its orders is not breached by a refusal to comply with such a direction, nor can any penalty be collected on account of such refusal.

Obviously a difficult question to determine, under the view holding closed shop contracts legal, will be that of discovering when the agreement is merely a matter of trade competition, devoid of malice, and not tending to monopoly; and when it is so extensive as to fall under the ban of monopoly, or so expressive of bad motive as to be condemned as malicious. No agreement can be viewed as standing on the same footing as the refusal of an individual to deal with another, since there is the original necessity of numbers to originate such an agreement; and the enforcement of it is by way of penalty on both members and employers, thus restricting their free choice, so that the arrangement falls under the condemnation of all undertakings by which it is sought to compel third parties to purchase the privilege of engaging in business by concessions to unauthorized and unofficial organizations.² The supreme court of Con-

¹ *McCord v. Thompson-Starrett Co.*, (N.Y.) 92 N.E. 1090, affirming 113 N.Y. Supp. 385, 129 App. Div. 130.

² *Union P. R. Co. v. Ruef*, 120 Fed. 102; *Aikens v. Wisconsin*, 195 U.S. 194, 25 Sup. Ct. 3; *Reynolds v. Davis*, 198 Mass. 294, 84 N.E. 457.

necticut ¹ must, however, be cited as countenancing such agreements, in addition to the citations already given.

Whichever view is taken of the agreements as such, where it appears that they were procured by threats and coercion their validity would be open at least to serious question, and if coercion were proved, they would be voidable.² Furthermore, the courts will not be concluded by the fact that the original agreement was voluntary, if its observance is found to be procured by measures amounting to coercion or intimidation by reason of which the subsequent freedom of choice is wrongfully and illegally restrained.³

The effect of the closed shop agreement on the liability of employers for injuries to employees whose selection and employment is regulated by such agreements has already been noticed (sec. 96).

SECTION 116. *The Union Label.* — One of the methods by which labor organizations undertake to strengthen their influence and to emphasize the benefits of organization is by the adoption of a mark or label, somewhat of the nature of a trade-mark, the privilege of the use of which is restricted to manufacturers who comply with the conditions fixed by the union adopting the label. The question of the propriety of classing such labels with trade-marks turns on the definition of the latter term. If a trade-mark is assumed to be the mark of a trader or manufacturer, implying that the article bearing it was made or sold by him, then the rules of law applicable to trade-

¹ *State v. Stockford*, 77 Conn. 227, 58 Atl. 769.

² *Doremus v. Hennessy*, 176 Ill. 608, 52 N.E. 924 ; 10 Am. & Eng. Enc., 2 Ed., p. 321.

³ *Martell v. White*, 185 Mass. 255, 69 N.E. 1085 ; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607.

marks do not extend to union labels; and on this view it has been held that such labels cannot be protected, since they do not indicate any individual manufacturer, nor "point distinctly to the origin or ownership of the article to which applied."¹ In another case it was said that the plaintiff could defend no special title to a label, since it was not a trader, and furthermore because the words of the label, "opposed to inferior rat-shop, cooly, prison, or filthy tenement house workmanship," showed a purpose to stigmatize all workmen of the craft not members of the union, so that equity would offer no redress for the alleged grievances.² On the ground that the right to a trade-mark can not exist apart from a business, and that such a mark is not itself property, the officers and members of a union were held not to be entitled to an injunction restraining the unauthorized use of the label of the union.³

The Supreme Court of the United States defines a trade-mark as a device to indicate "origin or ownership," and this would appear to be broad enough to cover the case of the label of a union. The subject has been made a matter of legislative action in nearly all of the states of the Union, provision being made for the registration and protection of the label adopted, and in many cases the word, "trade-mark" is so defined as to include the union label.⁴ Apart from statute, it has been held that while such a label is not a trade-mark, and no one has a vendible interest therein, but only a contingent right to use it, equity will nevertheless protect a complainant against fraudulent use

¹ *Cigar Makers v. Conhaim*, 40 Minn. 243, 41 N.W. 943.

² *MeVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912.

³ *Weener v. Brayton*, 152 Mass. 101, 25 N.E. 46.

⁴ Conn., G.S., secs. 4907-4912; Ind., A.S., secs. 8693-8703; Mass., R.L., ch. 72, secs. 7-14; N.Y., C.L., Ch. 13, secs. 15, 16.

by which the public is deceived and the rightful users are made to suffer pecuniary loss.¹ The statutes on the subject have been generally held to be constitutional.² In the Illinois and Indiana cases cited, the same label was under consideration as that condemned in the courts of Pennsylvania;³ but it was said in these cases that the language was not an attack, but was defensive only. In some cases the question of class legislation was raised, but the courts ruled that the act was neither local, private, nor discriminatory, but merely allowed a legitimate statement as to the class of workmanship employed. Descriptive words are no proper part of a trade-mark, but their use will not invalidate an otherwise appropriate mark.⁴ In opposition to the point made by the Massachusetts court in the case of *Weener v. Brayton*, *supra*, it has been held that since such a label is a symbol of the reputation of the goods on which it is placed, it acquires the character of property, and is therefore a valid subject of legislation.⁵ An international label was held not to be within the protection of a state law unless it was affirmatively shown that it could properly be registered thereunder;⁶ and the form of any label for which the protection of the law is sought must conform to the provisions of the statute.⁷

¹ *Carson v. Ury*, 39 Fed. 777. See also *Hetterman v. Powers*, 102 Ky. 133, 43 S.W. 180.

² *Schmalz v. Wooley*, 57 N.J. Eq. 303, 41 Atl. 939; *Tracy v. Banker*, 170 Mass. 266, 49 N.E. 308; *People v. Fisher*, 50 Hun. 552, 3 N.Y. Supp. 786; *Perkins v. Heert*, 158 N.Y. 306, 53 N.E. 18; *State v. Bishop*, 128 Mo. 373, 31 S.W. 9; *Cohn v. People*, 149 Ill. 486, 37 N.E. 60; *State v. Hagan*, 6 Ind. App. 167, 33 N.E. 223; *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

³ *McVey v. Brendel*, *supra*.

⁴ *People v. Fisher*, *supra*.

⁵ *State v. Bishop*, *supra*.

⁶ *State v. Hagan*, *supra*.

⁷ *Lawlor v. Merritt & Son*, 78 Conn. 630, 63 Atl. 639.

The use of a label not identical but misleading in appearance on a casual examination is a violation of a statute prohibiting the use of counterfeits or colorable imitations,¹ and it is as much an offense to use a genuine label without authority as to use an imitation thereof.² A statute prohibiting the use of a label without authority, or the use of a counterfeit label, was held not to make knowledge an ingredient of the offense, the act itself making the user liable;³ though it has been held that guilty knowledge must be shown, since nothing will be taken by way of intendment in the enforcement of a penal statute.⁴ The statutes frequently penalize only the known or willful violation of the law, and where such is not shown, no penalty will attach, and circumstances may even warrant the remission of costs in the issue of an injunction against further use of the label.⁵ A provision in a statute that the penalty to be adjudged against a violator of the law may be fixed by the complainant association and by it recovered in an action for debt amounts to usurpation of the judicial function, depriving the defendant of property without due process of law, and is unconstitutional.⁶

Under this head may be mentioned the statutes of a few states⁷ which require the union label to be placed on public printing. No decision of a court seems to have been made as to the constitutionality of such statutes, though they would obviously fall under the same condemnation as have ordinances

¹ *Myrup v. Friedman*, 112 N.Y. Supp. 1138.

² *Tracy v. Banker*, *supra*.

³ *Buela v. Newman*, 31 N.Y. Supp. 449, 10 Misc. 460.

⁴ *State v. Bishop*, *supra*.

⁵ *United Garment Workers v. Davis*, (N.J. Eq.) 74 Atl. 306.

⁶ *Cigar Makers' International Union v. Goldberg*, 72 N.J.L. 214, 61 Atl. 457.

⁷ Mont., R.C., sec. 254; Nev., C.L., sec. 1515.

of cities to the same effect.¹ Such laws are condemned as class legislation, tending to the promotion of monopolies, and leading to unwarrantable expenditure of the public funds, even where the law does not require the award of contracts to the lowest responsible bidder.

The right to wear the badge of a labor organization or to carry a union card is restricted to actual members by the statutes of a number of states.² On principle, such statutes would seem to fall fairly within the rule as to the right of the union label to protection, and to be valid as preventing fraud. It has been held, however that a statute forbidding the wearing of the badge of any organization except as permitted or provided by the constitution and by-laws of the same³ was unconstitutional as delegated legislation, since the right was made dependent on other than a public law; the act was also held void as discriminatory, in violation of the provisions of the fourteenth amendment of the federal Constitution.⁴

SECTION 117. *Restrictive Combinations. Antitrust Laws.* — Combinations of workmen may be condemned, or at least set outside of the protection of the law, on the ground that they are in restraint of trade. Their purpose to restrict employment to their own numbers or those in affiliation with them operates to exclude nonmembers from employment; and the courts will not enforce by injunction or otherwise the contracts of members to continue as such or to observe the rules of the associa-

¹ *Holden v. City of Alton*, 179 Ill. 318, 53 N.E. 556; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S.W. 815; *Atlanta v. Stein*, 111 Ga. 789, 36 S.E. 832; *Miller v. City of Des Moines*, 143 Iowa 409, 122 N.W. 226.

² Conn., Acts 1907, ch. 113; Ga., Acts 1899, p. 79; Mass., Acts 1909, ch. 514, secs. 31, 32; Minn., R.L., sec. 5053, etc.

³ Mont., Acts 1907, ch. 18.

⁴ *State v. Holland*, 37 Mont. 393, 96 Pac. 719.

tion, or in any way guarantee the status of the organization or of a member (unless property rights are involved), on the ground that such judicial sanction of the regulations would be an unjustifiable interference with the freedom of contract and of trade.¹ If an association is essentially for the purpose of restriction of output and of employment, and actively operates to impair the freedom of employers as well as restricting its own members, it may be disbanded as illegal;² or an injunction may issue against a combination to further a strike where the object of the strike is to enforce a closed-shop agreement.³

In some cases the language used in the consideration of combinations of workmen indicates a purpose to apply the same rules to them as to business agreements;⁴ though in others a distinction is sharply drawn, the right of laborers and professional men to combine to fix a price on their services being held lawful both at common law and under statutes generally.⁵ It

¹ *O'Brien v. Musical M. P. & B. U.*, 64 N.J. Eq. 525, 54 Atl. 150.

² *Kealey v. Faulkner*, 18 Ohio S. & C. P. Dec. 498.

³ *Reynolds v. Davis*, 198 Mass. 294, 84 N.E. 457; *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500.

⁴ *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S.W. 997.

⁵ *Rohlf v. Kasemeier*, 140 Iowa 182, 118 N.W. 276. It has been said recently that "so far as economic principles are concerned, and so far as considerations of fairness and justice are involved, there is not a word to be said in favor of any scheme of legislation which condemns combinations of capital and at the same time encourages combinations of labor." (Eddy on Combinations, sec. 896.) Admitting the possibility of abuse of both classes of combinations, the author quoted assumes the necessity of regulation, both groups being important to the welfare of society and the one demanding the other as its correlative. Another writer (Cogley, *Strikes and Lockouts*) reaches the same conclusion, though he says that the employer undoubtedly has the advantage because he has the most means, which is merely "the good fortune of the one party and the hard luck of the other, and is not the fault of the law." The actual legislative attitude has had some attention, both as regards labor organizations in particular (sec. 110), and in relation to employed persons in general (secs. 3 and 4); and while the courts

appears to be the rule, however, that where the question is one simply of the rights of employers to agree on the terms of the labor contract and the personnel of their employees, there is little if any difference between their rights and those of workmen.

It may be broadly stated that "all combinations in restraint of trade are contrary to public policy and illegal unless they are for the reasonable protection, by reasonable and lawful means, of persons dealing legally with some subject matter of contract."¹ Each case must turn on its conformity or nonconformity with the terms of the above rule, and protestations of innocent purpose or of simple obedience to the rules and obligations of the association must be weighed against the actual effects of the acts done and the reasonably anticipated consequences of rules of the nature pleaded. A combination of laborers to prevent the introduction of labor-saving machinery,² or to secure the employment of members of the union only³ (though many of the recent cases on this point seem to turn on the question of methods and the consequences to nonunion workmen, and hold the mere purpose of securing the employment of fellow-members lawful), or to compel all employees of several employers to join a particular union,⁴ or to prevent the employment of others to

have not uniformly recognized the constitutionality of differentiating statutes, there is at least room for effort to adjust the unequal economic conditions admitted by the author last quoted and recognized in many judicial opinions, on the ground that it is better to adapt legal and economic rules and doctrines to existing facts than to insist on the doctrines and ignore the facts.

¹ *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003.

² *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695.

³ *Elder v. Whitesides*, 72 Fed. 724; *Gatzow v. Buening*, *supra*; *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297.

⁴ *McCord v. Thompson-Starrett Co.*, 113 N.Y. Supp. 385.

take the place of workmen out on strike,¹ or a combination to procure employees under contract to quit their employment,² or, in general, a combination coming within the definition given below (sec. 118) of a conspiracy, is unlawful.

Legislation directed to the operation of business agreements, commonly known as antitrust legislation, is found in many states and on the federal statute books. As noted in sec. 111, some of these laws expressly exempt labor agreements from their application. A law prohibiting agreements to regulate the price of any commodity was held not to apply to labor, the court rejecting the view that labor can be classed as a commodity, and holding further that combinations to advance wages are lawful.³ The exception as to labor combinations in the antitrust law of Nebraska was declared unconstitutional by a federal court;⁴ this view was disapproved by the supreme court of the state, however, the law being held by it to be valid as enacted.⁵ An Illinois statute that amended the anti-trust law of that state by excepting wage agreements therefrom was held by the supreme court of the state to be unconstitutional,⁶ on the ground that the law was discriminatory, citing a similar conclusion of the Supreme Court of the United States as to a law of the same sort making exceptions of a different nature.⁷

An association whose by-laws restrict competition in bidding

¹ *Union P. R. Co. v. Ruef*, 120 Fed. 102.

² *Arthur v. Oakes*, 63 Fed. 310, 11 C.C.A. 209.

³ *Rohlf v. Kasemeier*, *supra*.

⁴ *Niagara Fire Insurance Co. v. Cornell*, 110 Fed. 816.

⁵ *Cleland v. Anderson*, 66 Nebr. 252, 92 N.W. 306.

⁶ *People ex rel. Akin v. Butler St. Foundry Co.*, 159 Ill. 249, 66 N.E. 353. See also *Eddy on Combinations*, secs. 911, 912.

⁷ *Connolly v. Pipe Co.*, 184 U.S. 540, 22 Sup. Ct. 431.

for work and require purchases of supplies to be made only from dealers who conform to the rules of the association is in restraint of trade and violates a law prohibiting contracts and combinations to prevent or destroy full and free competition in production.¹ Any member of a combination, if acting singly and individually, could lawfully refuse to deal with any person or persons not meeting the conditions set by him for his customers or patrons, and no law which would infringe upon his freedom in that regard would be valid; but an act that is harmless when done by one may become a public wrong through concert of action, and may be prohibited or punished as a conspiracy if it is injurious to the public or to individuals against whom it is directed.² The fact that an agreement entered into by several strips them of their own freedom of action as individuals was mentioned in the case last cited as a further warrant for holding the combination to be one in restraint of trade within the purview of a statute prohibiting combinations of that nature; the statute was also held to be constitutional.

The federal antitrust act³ declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," interstate or foreign. This act was held in an early case to apply to combinations of laborers no less than to those of capitalists, and the fact that the origin and general purposes of a combination were innocent and lawful in no wise lessens the illegality of acts that offend against the provisions of the statute.⁴ In this case an effort to secure the

¹ *Bailey v. Ass'n. of Master Plumbers*, 103 Tenn. 99, 52 S.W. 853.

² *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 30 Sup. Ct. 535; citing *Callan v. Wilson*, 127 U.S. 555, 8 Sup. Ct. 1301.

³ Act of July 2, 1890, 26 Stat. 209, Comp. Stat., p. 3200.

⁴ *United States v. Workingmen's Amal. Council*, 54 Fed. 994; Affirmed (C.C.A.), 57 Fed. 85.

employment of none but union men by the interruption of commerce by violent means was held to be a restraint of trade within the meaning of the act; so also of a boycott against a connecting railway line, and a refusal to handle its cars until it should come to terms with the organization;¹ and an injunction will properly lie against officers of an organization who incite strikes in furtherance of a purpose condemned by the act.² The subject received an extensive discussion in its bearing on the subject of combinations of labor in the case just cited. This case was carried to the Supreme Court and there affirmed,³ though not on the grounds of a violation of the antitrust law, but on the broader ground of the control of the national government over the transportation of the mails.

It was stated in the opinion in the above case that there was no dissent from the opinion of the court below as to the scope of the act, but this declaration was not understood in a later case in an inferior court as upholding the applicability of the law to a case in which efforts to unionize a factory involved the boycotting of the product in various states to which shipments were customarily made, with the result that such shipments were largely reduced. The court in this instance held that the only points of interference were the diminished sales in each locality and the reduction of manufacture locally, neither of which were matters classifiable as interstate commerce and subject to federal control.⁴ The Supreme Court of the United States, however, considered the question on appeal,⁵ and held

¹ *Waterhouse v. Comer*, 55 Fed. 149.

² *United States v. Debs*, 64 Fed. 724.

³ *In re Debs*, 158 U.S. 564, 15 Sup. Ct. 900.

⁴ *Loewe v. Lawlor*, 148 Fed. 924.

⁵ Same case, 208 U.S. 274, 28 Sup. Ct. 301.

that the combined acts had for their purpose an interference with interstate commerce, that labor unions are in no wise exempt from the strictures placed by the statute on combinations in restraint of trade, and that a boycotting of goods sold chiefly in other states than that of manufacture, for the purpose of coercing the manufacturer into an agreement with the union, was repugnant to the statute.

CHAPTER XII

LABOR DISPUTES

SECTION 118. *Conspiracies*.—The old common-law doctrine of conspiracy, which was by statute made to cover all labor combinations in Great Britain until within the past century, is frequently invoked to meet cases in which combinations are formed that are regarded as unduly interfering with business or property interests. Of practically the same nature and effect are certain prohibited combinations, not designated as conspiracies, for the purpose of “willfully or maliciously injuring another in reputation, trade, business, or profession, by any means whatever.”¹ It has been repeatedly declared that what one may lawfully do alone, many may do in combination;² though the better view is against the correctness of this assertion, unless properly qualified;³ but in general the fact of combination does not of itself suggest illegality.

A conspiracy, however, is essentially illegal, being most commonly defined as a combination of two or more persons to

¹ Wis., A.S. sec. 4466a.

² Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 119; Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 Pac. 127; National Protective Ass'n. v. Cumming, 170 N.Y. 315, 63 N.E. 369; Cooke, Combinations, Monopolies, and Labor Unions, sec. 16.

³ Aikens v. Wisconsin, 195 U.S. 194, 25 Sup. Ct. 3; Arthur v. Oakes, 63 Fed. 310, 11 C.C.A. 209; Buck's Stove & Range Co. v. American Federation of Labor, 35 Wash. L. Rep. 797, 70 Alb. L.J. 8; Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997.

perform an illegal act, or effect an illegal purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means; and a conspiracy to commit an offense may be more severely punished than the offense itself, under provision of statute.¹ The matter of definition and penalty may be regulated by statute, and several states have provisions declaring that labor agreements are not conspiracies;² though such laws do not legalize the class of conduct embraced in the definition given above, and where there is a malicious or corrupt agreement to deprive another of his liberty or property, the law has been violated, regardless of these statutes;³ nor does the fact that a state has a statute on the subject of conspiracy prevent common law actions in cases not falling within the purview of the statute.⁴

Conspiracies are classed as civil and criminal, the former giving rise to liability in damages to the person injured thereby, and the latter being punishable by the state as for any other offense. In criminal conspiracies the offense consists in the combination, and punishment will follow the proof of the conspiracy without regard to the attainment of its ends, since the law regards the act of unlawful combination and confederacy as dangerous in itself to the peace and welfare of society;⁵ while in civil conspiracies some damage to the complaining party must be shown. Any party thereto is liable for the conse-

¹ *Clune v. United States*, 159 U.S. 590, 16 Sup. Ct. 125.

² Cal., Sims' Pen. Code, p. 581; Md., P. G. L., Art. 27, sec. 33; Minn., R.L., sec. 4868; N.Y., C. L., ch. 40, sec. 582, etc.

³ *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Lucke v. Clothing Cutters*, 77 Md. 896, 26 Atl. 505; *Arthur v. Oakes*, *supra*.

⁴ *State v. Dalton*, 134 Mo. App. 517, 114 S.W. 1132.

⁵ *United States v. Cassidy*, 67 Fed. 698; *Clune v. United States*, *supra*; *Arthur v. Oakes*, *supra*.

quences of unlawful combinations, though he personally may not have participated in the performance of the acts leading up to them;¹ or even though no act whatever was done, if the conspiracy was criminal.² The fact that a civil recovery has been had is no bar to criminal proceedings, and *vice versa*.³

The statutes of a number of states require the performance of an overt act to establish criminal liability, but the performance of that act may still entail liability upon all,⁴ and the act itself need not be criminal if the conspiracy was so and the act shows a purpose of carrying it out.⁵

No conspiracy can exist without more parties than one, so that a judgment for damages against one party to an alleged conspiracy, the other parties being cleared of the charge, is self-contradictory.⁶ One need not be an original conspirator to become liable as such if he makes himself party to a conspiracy with knowledge of the character of its acts and purposes or of their reasonable tendency,⁷ and the innocent and lawful act of combining for mutual benefit passes into indictable conspiracy when threats, intimidation, and violence are adopted as means of enforcing the demands of the associates on employers or third persons. Inasmuch as any conspiracy charged will usually operate in one or more of the methods commonly employed by combinations in the prosecution of their ends, the subject will recur under the several topics, as strikes, boycotts, picketing, blacklisting, etc.

¹ Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730.

² Arthur v. Oakes, *supra*; State v. Buchanan, 5 Har. & J. (Md.) 317.

³ State v. Dalton, *supra*; Underhill v. Murphy, 117 Ky. 640, 78 S.W. 482.

⁴ U.S., R.S., sec. 5440. See Toledo, etc., R. Co. v. Pennsylvania Co., *supra*.

⁵ United States v. Gordon, 22 Fed. 250.

⁶ St. Louis S. W. R. Co. v. Thompson, 102 Tex. 89, 113 S.W. 144.

⁷ Conkey v. Russell, 111 Fed. 417; *ex parte* Richards, 117 Fed. 658; Goldfield Consol. Mines Co. v. Miners' Union, 159 Fed. 500.

The statutes declaring that labor agreements as to the conditions of employment are not conspiracies may contain the specific provision that the statute is to be construed as applying only to the combinations in question, and do not authorize the use of force or violence or threats thereof ;¹ or they may merely state that the orderly and peaceable assembling and coöperation of workmen for securing or maintaining desired conditions is not a conspiracy ;² nor is a refusal to work, following such an agreement, with the adoption and use of means to make the agreement effective.³

While these statutes, therefore, have the obvious intent of declaring such agreements lawful, they do not permit any violent or coercive action, and if they attempted to do so, they would be unconstitutional and void as putting certain persons above and beyond a salutary law that governs all others ;⁴ and while they prevent the prosecution as conspirators of those in combination, they do not take away the right of any individual injured by the combination to sue the responsible parties to recover damages.⁵ The statute may itself provide (as in the Pennsylvania law cited above) that it does not prevent the prosecution and punishment, under any other law than that of conspiracy, of persons who, by force, threats, or menace, hinder any one from working as he may desire ; it would seem, however, that such a provision is superfluous, since the use of the means indicated would doubtless take the agreement out from under the protection of the statute.

¹ Cal., Pen. Code, p. 581 ; Colo., A.S., sec. 1295.

² Minn., R.L., sec. 4868 ; N. Dak., R.C., sec. 8770.

³ N.J., G.S., p. 2344, sec. 23 ; Pa., B. P. Dig., p. 484, secs. 72, 73.

⁴ *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 406.

⁵ *Frank v. Herold*, 63 N.J. Eq. 443, 52 Atl. 152.

Of a somewhat different intent are laws prohibiting conspiracy against workingmen so as to prevent employment by intimidating them, or by taking away or hiding their tools; or by coercing or threatening employers so as to lead to their discharge or nonemployment.¹ These statutes can hardly be said to do anything more than to declare the common law in its application to special classes of persons.

SECTION 119. *Strikes*. — A strike may be defined as a preconcerted cessation of work by employees. As it is usually for the purpose of procuring some concession from the employer, the statement that it is for such purpose is frequently made a part of the definition.² Inasmuch as every man has a right to leave service at pleasure, with liability in damages only if a contract is violated,³ and without regard to reason or motive,⁴ it has been held that strikes are *per se* legal;⁵ and while this rule may be accepted as generally correct, it must be with the understanding that neither the purpose nor the method of the strike is unlawful. It is obvious that if a strike involved nothing more than the mere cessation of employment, initiated voluntarily by the workmen and so continued, leaving the employer and third persons free to such course of conduct as they might

¹ Fla., G.S., sec. 3515; Minn., R.L., sec. 4867; Miss., Code, sec. 1084; N.Y., C. L., ch. 40, sec. 580.

² For a fuller discussion of definitions see Martin, *The Modern Law of Trade Unions*, sec. 25.

³ *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753. The absence of contracts for a fixed period is assumed throughout this discussion, unless the point is specifically mentioned.

⁴ *Booth v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 231; *Raycroft v. Taintor*, 68 Vt. 219, 35 Atl. 53; *National Prot. Ass'n. v. Cumming*, 170 N.Y. 315, 63 N.E. 369; *Cooley*, Torts, p. 278.

⁵ *Union P. R. Co. v. Ruef*, 120 Fed. 102; *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155; *National Prot. Ass'n. v. Cumming*, *supra*.

choose, many of the questions usually involved would not arise. No writ can issue to compel former employees to return to work, any more than can an order directing employers to reinstate discharged workmen. Such a situation, therefore, need claim no further notice.

While the motive or purpose of the act of a single individual quitting work would not be made the subject of judicial inquiry, the fact of the concert of action of a number, if followed by damage, gives room for inquiry into the methods by which such concert was procured and maintained, as well as into the ends in view,¹ and if these are shown to involve coercion or intimidation, or an improper interference with the rights of individuals, employers or employees, or of the public at large, the necessity for legal or equitable intervention may appear.² If the object is the benefit of the members of the organization, the fact that incidental injury to others results creates no liability;³ but if injury is the primary motive, and the possible benefit accruing to the members is remote and indirect, the strike will be denounced as illegal.⁴ And even where an anticipated beneficial result is offered as a defense, the courts will not allow the perpetration of a wrong, since "no conduct has such an absolute privilege as to justify all possible schemes of which it may be a part;"⁵ nor do statutes legalizing labor combinations and

¹ *Aikens v. Wisconsin*, 195 U.S. 194, 25 Sup. Ct. 3.

² *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011; *Brennan v. Hatters*, 73 N.J.L. 729, 65 Atl. 165; *Allis-Chalmers Co. v. Iron Molders' Union*, *supra*.

³ *National Fireproofing Co. v. Mason Builders' Ass'n.*, 169 Fed. 259; *Allis-Chalmers Co. v. Iron Molders' Union*, *supra*; *National Protective Ass'n. v. Cumming*, *supra*; *Pickett v. Walsh*, *supra*.

⁴ *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603; *Curran v. Galen*, 150 N.Y. 33, 46 N.E. 297; *Brennan v. Hatters*, *supra*.

⁵ *Aikens v. Wisconsin*, *supra*; see also *Purvis v. United Brotherhood*, 214 Pa. St. 328, 63 Atl. 585; *State v. Stockford*, 77 Conn. 227, 58 Atl. 769.

strikes modify this rule in any wise.¹ The fact that workmen are in the employment of a receiver under the direction of a court does not affect their right to combine or to strike.²

Within the above rule, strikes against an employer to secure an increase of wages, reduction of hours, changes of shop rules, safer or more satisfactory physical conditions of employment, and the like, are obviously lawful; and the employer is without remedy even though the strike threatens to result, or actually results, in his financial ruin,³ or also in the inconvenience of the public.⁴ The strike must, however, be actually justifiable, and while the strikers must have acted in good faith in striking for what seemed to them a justifiable cause, the courts will themselves decide whether or not the purpose for which the strike was instituted amounts to a legal justification of it.⁵ The chief difficulty in cases of this sort arises from the subsequent proceedings by means of which the employees seek to regain employment on the terms of their choice. Strictly speaking, employees who have gone out on a strike or who have been discharged or locked out are as completely severed, in the eyes of the law, from all relations with their former employers as if the relation had never existed, and the relation can be resumed only by virtue of a mutual agreement *de novo* between the parties; and this is true whether the employment was under contract terminable at will,⁶ or for fixed periods.⁷ If this rule

¹ *Arthur v. Oakes*, 63 Fed. 310, 11 C.C.A. 209; *Curran v. Galen*, *supra*; *Cumberland Glass Mfg. Co. v. Bottle Blowers*, 59 N.J. Eq. 49, 46 Atl. 208; *People ex rel. Gill v. Smith*, 5 N.Y. Cr. Rep. 512, affirmed, 110 N.Y. 633, 17 N.E. 871.

² *Arthur v. Oakes*, *supra*; *In re Higgins*, 27 Fed. 443.

³ *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721.

⁴ *Arthur v. Oakes*, *supra*.

⁵ *De Minico v. Craig* (Mass.), 94 N.E., 317.

⁶ *Union P. R. Co. v. Ruef*, *supra*; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C.C.A.).

⁷ *King v. W. U. Tel. Co.*, 84 S.C. 73, 65 S.E. 944.

were carried to its logical conclusion, it would leave the employer free to continue his work as rapidly as new workmen could be secured who were willing to accept existing conditions. The courts, however, generally allow to the striking workmen the privilege of counseling with and persuading nonstriking or prospective employees not to work, so that the places may remain unfilled until the employer grants the desired concession. (See sec. 120.)

Strikes are frequently undertaken to affect the personnel of the working force, either by procuring the discharge of employees not in favor with a combination of their fellow-workmen or other organization, or by influencing the employer to reinstate a discharged workman or to employ certain individuals or classes of workmen. A strike to secure the reinstatement of a discharged workman would seem to be lawful,¹ and such a right is in close relation to the right to strike to procure the employment of persons acceptable to a union. This rests on the ground that members of a union may lawfully agree not to work with any but fellow-members, and may carry out that agreement so long as they confine themselves to peaceable means;² and this is true even though the employer is put to additional expense and inconvenience thereby,³ or other workmen deprived of opportunities of employment;⁴ but a strike to procure the discharge of a workman merely on the ground of personal dislike, with no showing that his discharge will actually better the

¹ *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *National Protective Ass'n. v. Cumming*, *supra*. *Per contra*, *State v. Donaldson*, 32 N.J. L. 151, 90 Am. Dec. 640. In none of these cases was this point directly in issue.

² *Mayer v. Journeymen Stonecutters' Ass'n.*, 47 N.J. Eq. 519, 20 Atl. 492.

³ *Pickett v. Walsh*, *supra*; *National Fireproofing Co. v. Mason Builders' Ass'n.*, *supra*.

⁴ *National Protective Ass'n. v. Cumming*, *supra*.

condition of the striking workmen, is unlawful, and the workman interfered with by such action is entitled to damages.¹ And it is said that a strike which has for its object not so much the advantages of the employment of the members of the union as the monopoly of the labor market will be regarded as unlawful, and acts in its furtherance will be enjoined.²

The reasons assigned for putting such power into the hands of combinations of employees, obviously affecting the power of others to act according to their unrestricted choice, are various. In the Pickett case organized bodies of bricklayers and stone-setters refused to work for building contractors unless the latter would also give them the work of cleaning and pointing the walls. The workmen who had been employed for this part of the work sought to prevent the strike by asking for an injunction against any form of interference with their employment. The employers favored the request, as they wished to divide the work for reasons of economy for themselves and because they claimed that the pointers did better work in their specialty than would be done by the stonemasons and bricklayers. The court held that as a matter of trade competition the latter workmen were justified in refusing to do any work on the building unless they were allowed to do it all; and this though it added to the cost of work done by the contractors and absolutely debarred the pointers, who could not lay brick or stone, from all employment, since such results are the natural and legitimate consequences of competition. This reasoning would support broadly the legality of strikes undertaken to secure the employment of none but members of the association acting, and this

¹ *De Minico v. Craig, supra.*

² *Folsom v. Lewis (Mass.)*, 94 N.E. 316.

is the attitude of the courts generally where the motive is apparently the benefit of the membership and not an attack on others to wantonly or maliciously deprive them of employment.¹ Strikes against the employment of persons not members of unions have been justified also on the ground that the union members were warranted in using such means to protect themselves from the consequences to themselves of the employment of unskillful or careless fellow-servants;² so also if a workman's "habits or conduct or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character."³

Where a contemplated strike is of a lawful nature, it is not unlawful to notify employers or others affected of the intention to strike. In other words, it is not unlawful to foretell or threaten the performance of a lawful act.

Strikes have been declared unlawful where the object was to enforce the payment of a fine imposed on the employer for not giving the union all his work,⁴ since there is no privity of contract between the union and a nonmember, nor will any one be compelled to buy his peace or the right to do business by payments to nongovernmental bodies. It has also been held that a strike is not lawful that has for its object the compulsory submission to a committee of the employees of questions relating to individual employees and the enforcement of the conclusions

¹ *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603; *National Protective Ass'n. v. Cumming*, *supra*; *Gray v. Building Trades' Council*, 91 Minn. 171, 97 N.W. 663; *Mayer v. Journeymen Stonecutters' Ass'n.*, *supra*.

² *National Protective Ass'n. v. Cumming*, *supra*.

³ *Berry v. Donovan*, *supra*.

⁴ *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *March v. Bricklayers' & Plasterers' Union*, 79 Conn. 7, 63 Atl. 291; *State v. Dalton*, 134 Mo. App. 517, 114 S.W. 1132.

of such committees.¹ On the same principle a strike is unlawful where the purpose is to enforce the payment of fines levied on workmen who do not belong to the union levying such fines.² Neither can an employer be made the collector of a fine assessed by the union against a member employed by him.³

A strike to compel workmen to join a union by refusing to work with them until they joined has been declared unlawful, since, while actual competition will not be restrained, coercive acts or threats or wanton and malicious interference with business relations are unlawful.⁴ It has been held, however, that strikes to procure the discharge of workmen who refused to join a union are lawful,⁵ and it is clear that the same result as to both the nonunion workman and the employer may be reached by a concerted refusal to work with any but members of a union, which is seen to be legal if for purposes esteemed beneficial and not for purposes of persecution.

It has been assumed, though the point was not in issue, that strikes in violation of contracts are unlawful;⁶ but since it is well-settled law that the violation of contracts entails only liability for damages resulting therefrom and that no enforce-

¹ *Reynolds v. Davis*, 194 Mass. 294, 78 N.E. 457.

² *People v. Melvin*, 2 Wheeler's Crim. Cases, 262.

³ *Hillenbrand v. Building Trades Council*, 14 Ohio Dec. N.P. 628; *Brennan v. Hatters*, 73 N.J. L. 729, 65 Atl. 165.

⁴ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327; *O'Brien v. People*, 216 Ill. 354, 75 N.E. 108; *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297; *State v. Dyer*, 67 Vt. 790, 32 Atl. 814; *Walker v. Cronin*, 107 Mass. 555.

⁵ *Gray v. Building Trades' Council*, *supra*; and see *Commonwealth v. Hunt*, 4 Mete. (Mass.) 111, 38 Am. Dec. 346.

⁶ *State v. Stockford*, 77 Conn. 227, 58 Atl. 769; *Reynolds v. Davis*, *supra*; *United States v. Haggerty*, 116 Fed. 510; *Goldfield Consol. Mines Co. v. Miners' Union*, 159 Fed. 500.

ment of a contract of personal service is possible, the grounds for such assumptions are not clear; and it has been specifically held that no restraint can be put upon striking employees, even though by striking they violate their contracts.¹

Strikes are sometimes undertaken by workmen who have no grievance against their employer directly, but who use the strike as a means of procuring his influence in the settlement of a dispute between another employer and his workmen. Such strikes have been designated as sympathetic strikes, and partake of the nature of the boycott. The purpose is to obtain concessions by forcing third persons, who have no interest in the dispute, to force employers to grant the demands of their workmen, and strikes of this nature have been held to be unlawful as interfering with trade freedom.² This view limits the right of organized labor to use the strike only as a means of influencing the persons with whom a trade dispute actually exists, without involving disinterested parties. It has been said that sympathetic strikes are nothing more than boycotts, and are illegal if boycotts are illegal;³ though another writer defends them on the ground of the "solidarity of interest" between the employees of the two employers.⁴ The consensus of judicial opinion is, however, against the lawfulness of the sympathetic strike.

Certain incidental consequences of strikes have received

¹ *A. R. Barnes & Co. v. Berry*, 156 Fed. 72; *Arthur v. Oakes*, 83 Fed. 310, 11 C.C.A. 209; *Knudsen v. Benn*, 123 Fed. 637; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C.C.A. 99.

² *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753; *Reynolds v. Davis*, *supra*.

³ *Tiedeman*, *State and Federal Control of Persons and Property*, p. 440. As to the legality or illegality of boycotts, see sec. 122.

⁴ *Cooke*, *Combinations, Monopolies, and Labor Unions*, pp. 120, 121.

judicial consideration, and some of these may be briefly noted. A case of this sort is where the employees of a street railway company were on a strike and a passenger sued the company to recover damages for personal injuries received by him on one of its cars. The right of recovery was denied in this case, the court holding that there was no liability unless the company knew or ought reasonably to anticipate that it could not safely carry passengers by the exercise of the utmost care on its part.¹ This accords with the ruling that telegraph and telephone companies are not liable for losses resulting from the failure to transmit messages where such failure is due to the acts of striking employees.² So a law penalizing a railroad company for failure to furnish cars on demand is not applicable where such failure is due to strikes;³ and a strike clause in a contract of service is a valid defense in a suit for delay, where the delay actually results from a strike;⁴ but a delay caused by a voluntary lockout by the employer affords no such defense.⁵

A suit by a property holder to recover damages from an employer for injury to his property by the violent acts of striking employees is without grounds, since the employees are in no wise acting within the scope of their employment or by the authority of their employer in the commission of the unlawful acts complained of.⁶

A workman quitting service, alleging fear of injury from strik-

¹ *Fewings v. Mendenhall*, 83 Minn. 237, 86 N.W. 96.

² *Sullivan v. W. U. Tel. Co.*, 82 S. C. 569, 64 S. E. 752, citing *Jones on Telegraph and Telephone Companies*, secs. 360, 361.

³ *Murphy Hardward Co. v. Southern R. Co.*, 150 N.C. 703, 64 S.E. 873.

⁴ *The Toronto*, 168 Fed. 386.

⁵ *Mahoney v. Smith*, 116 N.Y. S. 1091.

⁶ *Shay v. American Iron & Steel Mfg. Co.*, 218 Pa. 172, 67 Atl. 54.

ing fellow-workmen if he continues, will be regarded as breaking the contract of employment and liable for resultant damages, since the employer is not responsible for the cause of the breach, and does not himself effect it.¹ The effect of such a breach on the employee's right to recover any balance of wages previously earned will be governed by the same rules as in other cases of violated contracts (see sec. 8). It has been held that where a workman accepted employment with one whose employees had gone on strike and had threatened violence to any one taking their places, the employer's failure to inform the new employee of the circumstances makes him liable for such injuries as the workman may receive as a result of thus ignorantly accepting employment.² The laws of a few states direct employers advertising for workmen to give notice of strikes affecting them, if any.³ In one aspect these laws come within the rule that the employee should be informed of hazardous conditions known to the employer and not patent (see sec. 68), though they may also express the same purpose as the Illinois statute which forbade free public employment offices to furnish names of applicants for employment to employers whose workmen were on strike (see sec. 108). Viewing the enactment from the latter standpoint, the Illinois supreme court declared unconstitutional the statute requiring notice of labor disputes, on account of its unequal application to employers and workmen differently situated, and to employers as compared with other persons making contracts.⁴ A law of slight probable validity is one

¹ *Fisher v. Walsh*, 102 Wis. 172, 78 N.W. 437.

² *Holshouser v. Denver Gas & Electric Co.*, 18 Colo. App. 431, 72 Pac. 289.

³ Ill., R.S., ch. 48, sec. 49; Mass., Acts 1910, ch. 445; Tenn., Acts 1901, ch. 104. Assumed to be valid in *Steinert & Sons Co. v. Tagen*, (Mass.) 93 N.E. 584.

⁴ *Josma v. Western Steel Car & Foundry Co.*, (Ill.) 94 N.E. 945.

of Minnesota which forbids employers to require as a condition precedent to employment any statement in writing as to the participation of applicants for employment in any strike.¹

Statutes making municipalities liable for damage done by mobs and riots are constitutional, and are applicable in cases where the injury is to the property of the former employer of the striking workmen and is done by such workmen.²

The legality of strikes has been made the subject of legislation in a few states, either directly or by implication. Of the latter class are the laws declaring that labor agreements are not conspiracies (see sec. 118); and that it is not unlawful for two or more persons to unite or combine or agree in peacefully advising or encouraging others to enter into combinations in relation to entering into, leaving, or remaining in the employment of any person or corporation.³ Laws of this class do not legalize the commission or threat of acts of violence, nor do they restrict the power of the courts to enjoin such acts, their only effect being to declare legal certain combinations, but not authorizing coercive measures;⁴ and while declaring the combinations not criminal, they do not take away the right of any one injured thereby to sue for damages.⁵

Another group of laws is one relating to strikes of railroad employees, by which it is forbidden to abandon trains or locomotives in the furtherance of a strike at any other than the

¹ Minn., R.L., sec. 1823.

² *Pennsylvania Co. v. City of Chicago*, 81 Fed. 317; *Pittsburg, C. C. & St. L. R. Co. v. City of Chicago*, 242 Ill. 178, 89 N.E. 1022.

³ Colo., A.S., sec. 1295; N.J., Gen. St., p. 2344, sec. 23.

⁴ *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Goldberg v. Same*, 149 Cal. 429, 86 Pac. 806; *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers*, 59 N.J. Eq. 49, 46 Atl. 208; *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297.

⁵ *Frank v. Herold*, 63 N.J. Eq. 443, 52 Atl. 152.

point of destination or a division point.¹ These laws come within the reason of statutes penalizing the violation of contracts of employment when the probable consequence of the act is the jeopardizing of life or of valuable property;² and while no case is at hand giving these statutes an authoritative construction, they are probably valid.³

Insurance against loss or injury to business by strikes presents chiefly, of course, the construction of the contract under existing circumstances. The acceptance and retention of premiums with full knowledge of existing disturbed conditions will bar the plea that the insured party did not give notice of such conditions. So also if replies to inquiries are ambiguous and the policy is nevertheless issued, the company cannot afterwards complain of such ambiguity in an effort to avoid the liability provided for in the policy.⁴

SECTION 120. *Persuasion or Incitement to Strike.* — Although it is generally held that the act of a workman in striking terminates absolutely his contract with his employer and leaves both parties without any relation or mutual status whatever,⁵ the fact remains that there exists in many minds a recognition of a sort of continuing relation which differentiates striking workmen in some degree from those never in the abandoned

¹ Ill., R.S., ch. 114, sec. 108; Kans., G.S., sec. 2374; N.Y. Acts 1903, ch. 257, sec. 62; Pa., B. P. Dig., p. 533, sec. 357.

² N.Y., Con. L., ch. 40, sec. 1910; Wash., Acts 1909, ch. 249, sec. 281.

³ Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 746; Arthur v. Oakes, 83 Fed. 310, 11 C.C.A. 209.

⁴ Buffalo Forge Co. v. Mutual Security Co. (Conn.), 76 Atl. 995.

⁵ Union P. R. Co. v. Ruef, 120 Fed. 102; Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 323; Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500; Pope Motor Car Co. v. Keegan, 150 Fed. 148; Knudsen v. Benn, 123 Fed. 636.

employment. This is recognized within certain bounds by the courts as well, inasmuch as it is generally conceded that strikers may reason with other workmen or possible applicants for the vacated positions and seek to persuade them not to remain in or accept employment with their former employer.¹ It was even said in a concurring opinion in a recent case that, where a strike or a lockout has for its purpose the procuring of more desirable terms of employment from one of the parties to a labor contract, the act of striking or locking out does not completely terminate the relationship between the parties. "The relationship is an anomalous one, yet distinctive, and of such nature as to secure to the parties certain correlative rights under which acts may be performed that would assume a different aspect if done by absolute strangers or in different circumstances."²

The extent to which this rule may be carried is difficult to determine, since, while it seems clear that peaceable persuasion in connection with a lawful strike should be regarded as lawful, it may not be legally carried so far as to become vexatious and coercive, nor may the equal rights of all men in freely contracting or in seeking employment be ignored. A display of force, though with no use of actual violence, is unlawful,³ and no one has the right to obtrude upon others to impose upon them arguments and persuasion to which they are unwilling to listen.⁴ Strikers

¹ *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631; *Karges Furniture Co. v. Amalgamated Woodworkers' Union*, 165 Ind. 421, 71 N.E. 877; *Wabash R. Co. v. Hannahan*, 121 Fed. 563; *Everett-Waddy Co. v. Typographical Union*, 100 Va. 188, 53 S.E. 273; *Jones v. E. Van Winkle Gin & Machine Works*, 131 Gal. 336, 62 S.E. 236.

² *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*.

³ *O'Neil v. Behanna*, 182 Pa. St. 236, 37 Atl. 843.

⁴ *Frank v. Herold*, 63 N.J. Eq. 443, 52 Atl. 152; *Southern R. Co. v. Machinists' Local Union*, 111 Fed. 49; *O'Neill v. Behanna*, *supra*; *Union P. R. Co. v. Ruef*, *supra*; *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, *supra*.

may not go upon the premises of the employer to confer with his employees, since in doing so without his permission they become trespassers.¹ Intimidation must not be disguised in the assumed character of persuasion. Persuasion too emphatic or too long and persistently continued may itself become a nuisance, and its use a form of unlawful coercion.²

With the extensive and freely used power of organizations to influence the prospects of employment or of the formation and maintenance of business relations of every sort, it must be admitted that a simple representation to the effect that a given course of conduct is looked upon with disfavor by an organization is of itself a potent influence, and often amounts to an interference with the free course of conduct on which the "probable expectancies" of business rest.³ Such interference, therefore, even if by simple persuasion, is not an absolute right, but demands justification for its exercise. Courts have given utterance to the statement that a wrongful motive cannot convert a legal act into an illegal one,⁴ but the overwhelming consensus of opinion is to the effect that acts affecting injuriously or in any manner interfering with or embarrassing the course of employment or business require justification in order to protect them from being actionable, however legal they may be merely as acts.⁵ The question whether conduct is actionable necessarily

¹ *Webber v. Barry*, 66 Mich. 127, 33 N.W. 289.

² *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 49; *O'Neil v. Behanna*, *supra*.

³ *State v. Donaldson*, 32 N.J.L. 151, 90 Am. Dec. 640; *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297.

⁴ *Quinn v. Leatham*, 85 L.T. 289; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027; *State v. Van Pelt*, 136 N.C. 633, 49 S.E. 177.

⁵ *Aikens v. Wisconsin*, 195 U.S. 194, 25 Sup. Ct. 3; *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301; *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 Atl. 230; *State v. Stockford*, 77 Conn. 227, 58 Atl. 769; *Reynolds v. Davis*, 198 Mass.

calls for determination on the merits of the individual case; and "justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined."¹

The problem of determining the boundary between persuasion of an allowable sort and that which will be condemned as coercive is therefore one of fact, and each case will be determined on its own surroundings. The courts will not decree all persuasion an interference, "but where evidence presents such a case as to convince the court that the employees are being induced to leave the employer by operating upon their fears rather than upon their judgments or their sympathy, the court will be quick to lend its strong arm to his protection."²

Officials of labor organizations who are not fellow-workmen with the employees, and who have therefore no relation to the employers, may nevertheless counsel and advise with employees who are members of their organizations as to the advisability of striking, especially where no strike can take place without the vote and consent of the employees themselves;³ and if the officials are themselves authorized by the union to call or declare strikes in their discretion, it is not unlawful for them to so act.⁴

294, 84 N.E. 457; *Huskie v. Griffin*, 75 N.H. 345, 74 Atl. 595; *Martin*, *The Modern Law of Labor Unions*, p. 47; *Erle*, *Trade Unions*, p. 20; *Pennant*, *Trade Unions and Workmen*, p. 39. This view is rejected by *Cooke*, *Combinations, Monopolies, and Labor Unions*, pp. 17-22, though he cites numerous cases which, he says, "seem, generally speaking, to uphold the view condemned in the text."

¹ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011.

² *Rogers v. Evarts*, 17 N.Y. Supp. 264.

³ *A. R. Barnes & Co. v. Berry*, 157 Fed. 883; *Delaware, L. & W. R. Co. v. Switchmen's Union*, 158 Fed. 541; *Wabash R. Co. v. Hannahan*, *supra*.

⁴ *Thomas v. Cincinnati N. O. & T. P. R. Co.*, 62 Fed. 803; *Delaware, L. & W. R. Co. v. Switchmen's Union*, *supra*.

These rights do not extend, however, so far as to give liberty to incite strikes in the violation of contracts, even though the workmen might of themselves lawfully so strike.¹ Obviously, organizers seeking to extend the ranks of organized labor and not as yet in association with the workmen could not so interfere,² since it is on the basis of the community of interest of associated workmen and their mutual agreements as to representation and authority that the acts of counseling or directing must rest for their justification.³ The officers charged with the control of strike funds may lawfully use them to pay the cost of transportation of workmen away from the locality in or at which a strike is in progress, or to offer to pay benefits to employees as an inducement to them to leave service; since "the strike benefit fund is created by moneys deposited by the men with the general officers for the support of themselves and families in time of strike, and the court has no more control of it than it would have over deposits made by them in the banks."⁴ It has been held that such payments may be made to persons who are not members of the organization contributing to the fund.⁵

SECTION 121. *Picketing*. — Picketing as an incident to strikes is a watching or espionage of the place of employment or the approaches thereto, or of the homes or lodging places of em-

¹ A. R. Barnes & Co. v. Berry, 156 Fed. 72; Reynolds v. Davis, 198 Mass. 294, 84 N.E. 457; Wabash R. Co. v. Hannahan, *supra*; Arthur v. Oakes, *supra*; Jersey City Printing Co. v. Cassidy, *supra*.

² Hitchman Coal Co. v. Mitchell, 172 Fed. 963; Flaccus v. Smith, 199 Pa. St. 128, 48 Atl. 894; United States v. Haggerty, 116 Fed. 510.

³ See National Protective Ass'n. v. Cumming, 170 N.Y. 315, 63 N.E. 369; Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753; Iron Molders' Union v. Allis-Chalmers Co., *supra*.

⁴ A. R. Barnes & Co. v. Berry, 157 Fed. 883.

⁵ Everett-Waddy Co. v. Richmond Typographical Union, *supra*; Rogers v. Evarts, *supra*.

ployees or possible employees, to procure information as to the progress of the strike and as to any means to make it effective. It has been defined as a watching and annoying, and while the word had not such a meaning in its original use, it is said that the definition has taken that form as the result of the conduct of those engaged in the work of picketing, and that the adoption of a term derived from the nomenclature of war is appropriate as the picket is an expression of hostility and is evidence that a state of war exists.¹

The courts differ as to the lawfulness of picketing. Where it is in aid of an unlawful strike, or is accompanied by violence or by such a display of force or numbers as to intimidate workmen or the public, or to obstruct the highways or the approaches to places of business or employment, there is no difference of opinion. An insulting or menacing attitude may be no less intimidating than an actual assault, and a request may be coercive by mere force of numbers.² The fact that pickets are appointed by an organization in no wise relieves them from personal responsibility for their conduct toward third persons; and the fact that they are the representatives of a "mysterious and powerful organized authority" may be considered in determining whether or not the picketing is intimidating and coercive in its nature and effect.³ Picketing has been broadly condemned

¹ *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 698; *Beck v. Teamsters' Protective Union*, 118 Mich. 497, 77 N.W. 13; *Jones v. E. Van Winkle Gin & Machine Works*, 131 Ga. 336, 62 S.E. 236.

² *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077; *Ideal Mfg. Co. v. Ludwig*, 149 Mich. 133, 112 N.W. 723; *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155.

³ *Karges Furniture Co. v. Amalgamated Woodworkers*, 165 Ind. 421, 75 N.E. 877; *Allis-Chalmers Co. v. Iron Molders' Union*, *supra*; *Vegelahn v. Guntner*, *supra*.

as illegal on the ground that the fact of its establishment is evidence of an intention to annoy, embarrass, and intimidate; and the position of the pickets, a few feet or a thousand feet from the picketed person's place of business, is immaterial, since the whole procedure is an unwarranted interference with the course of business.¹ Men may singly or jointly quit an employer, but they have no right, either singly or jointly, in the absence of legitimate interests to protect, to seek to ruin a man's business by gathering about the approaches to his place of business, and there by either persuasion, coercion, or force, prevent his patrons and the public at large from dealing with him;² and it has been said that there can be no such thing as a peaceful picketing,³ and that its maintenance is an injurious interference in a matter in which the pickets had no rightful concern, and is unlawful.⁴ "In its mildest form it is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted, antagonistic committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property as is a boycott which prevents the sale of his product."⁵

The majority of cases seem to hold, however, that picketing is not of itself unlawful, and that the circumstances of each case must be considered. "There must be taken into account the size of the guard, the extent of their occupation of the street,

¹ *A. R. Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, 83 N.E. 940; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 323; *Beck v. Railway Teamsters' Protective Union*, *supra*; *Otis Steel Co. v. Iron Molders' Union*, *supra*.

² *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069.

³ *Atchison, Topeka & Santa Fe R. Co. v. Gee*, 139 Fed. 582; *Union P. R. Co. v. Ruef*, 120 Fed. 102.

⁴ *Knudsen v. Benn*, 123 Fed. 636.

⁵ *Geo. Jonas Glass Co. v. Glass Bottle Blowers*, 72 N.J. Eq. 653, 66 Atl. 953.

and what they say and do. Taking every circumstance into account, if it appears that the purpose of the picketing is to interfere with those passing into or out of the works, or those wishing to pass into the works, by other than persuasive means, it is illegal. If the design of the picketing is to see who can be the subject of persuasive inducements, such picketing is legal.”¹ It was said in the above case, however, that “a permanent guard in a public street in front of citizens’ houses or a factory, is in itself a nuisance”; and another court, while holding that peaceful picketing is at least theoretically possible, and is entirely lawful, said that is nevertheless “very much of an illusion.”²

From the distinctions drawn by the supporting cases, and from the fact that in some of them it was found that the right to picket had been exercised so as to transcend lawful bounds, it is evident that the line between a picketing that the courts will allow and one that they condemn is easily and frequently transgressed in fact. Thus in the *Allis-Chalmers* case, the court suggested the adoption of a button by pickets, and their employment in limited numbers. It was found that they were used in such numbers and in so threatening a manner as to depart entirely from the purpose of the court in making the suggestion, and it was said by the court in the course of its decision that peaceful picketing generally developed into strong, persistent, and organized persuasion and social pressure of every descrip-

¹ *Cumberland Glass Mfg. Co. v. Glass Blowers’ Ass’n.*, 59 N.J. Eq. 49, 46 Atl. 208. See also *Iron Molders’ Union v. Allis-Chalmers Co.*, *supra*; *Karges Furniture Co. v. Amalgamated Woodworkers*, *supra*; *Pope Motor Car Co. v. Keegan*, *supra*; *Mills v. U.S. Printing Co.*, 99 App. Div. 605, 91 N.Y. Supp. 185; *Everett-Waddy Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S.E. 273.

² *Allis-Chalmers Co. v. Iron Molders’ Union*, *supra*.

tion, making the condition of workmen disagreeable and intolerable, and that then "the condition has passed from that of the peaceful purpose of promoting the economic ends of the union men, and has entered the unlawful stage of malicious injury, without just cause or excuse, to rights just as important, and as fully protected by the constitution, as those on whose behalf these acts are committed." The defense of the act rests on the fact that "the right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment." It has been said that the right to persuade and to picket should be maintained, but with watchfulness on the part of the courts to determine whether or not duress is being used under the guise of persuasion, and intimidating obstruction and annoyance under that of picketing.¹ The Illinois supreme court rejects this as not a safe rule, since "it furnishes no fixed standard of what is lawful. Any picket line must result in annoyance to both the employer and the workman, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge."² This is condemning a rule of law because not of easy application, and the view expressed in connection with the drawing of the line between persuasion and intimidation will doubtless command more general approval; but it is clear from the number and weight of the opinions against it that the right of picketing is one of

¹ *Iron Molders' Union v. Allis-Chalmers Co.*, *supra*.

² *A. R. Barnes & Co. v. Chicago Typographical Union*, *supra*.

the more doubtful ones, and is to be exercised only within strict bounds, where at all tolerated, if it is to avoid prohibition. When it is connected with the boycott, picketing is generally condemned,¹ since it amounts to an effort to coerce, or to influence by other means than free argument and persuasion. Where the boycott is held unlawful, of course acts in furtherance thereof are unlawful.

An organization of workmen, not employees of the company whose works are being picketed, has no such right or interest in the matter of the maintenance of a picket as to warrant the granting of an injunction against the employer to prevent his taking measures against the maintenance of pickets at or about his plant.² It was said in this case that the grievance, if any, was that of the pickets themselves; that the organization as an employer of pickets had failed to show any substantial pecuniary damage; and from all that appeared, a suit at law would afford ample redress against the financially responsible employer. Where a picket engages in unlawful acts which are accepted or approved by the labor union, it becomes responsible therefor, and an injunction will lie against it to prevent the further maintenance of such pickets.³

Statutes prohibiting picketing are found in a few states.⁴ The prohibitions of these laws run against going near or loitering about the premises where any lawful business is carried on, for

¹ *Geo. Jonas Glass Co. v. Glass Bottle Blowers, supra*; *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721. And see the following section.

² *Atkins v. W. & A. Fletcher Co.*, 65 N.J. Eq. 658, 55 Atl. 1074.

³ *Geo. Jonas Glass Co. v. Glass Bottle Blowers, supra*; *Goldfield Consol. Min. Co. v. Goldfield Miners' Union*, 159 Fed. 500; and see *Union P. R. Co. v. Ruef*, 120 Fed. 102.

⁴ Ala., Code, sec. 6395; Colo., Acts 1905, ch. 79.

the purpose of influencing or inducing others not to have dealings with those engaged in such business; or the picketing of any works or place of business for the purpose of interfering with or injuring any lawful business. A city ordinance prohibiting picketing for the purpose of intimidation or of threatening workmen was held valid;¹ though it was said that very serious doubts exist as to the validity of a provision as to loitering, similar to those in the statutes noted above. The supreme court of Missouri declared unconstitutional a city ordinance which prohibited lounging or loafing on street corners or other public places, in a case in which the ordinance was invoked to procure the arrest of pickets.²

SECTION 122. *Boycotts.* — The boycott has been defined as “a combination to harm one person by coercing others to harm him”;³ or as “an organized effort to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence”;⁴ or as “a confederation, generally secret, of many persons whose intent it is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators”;⁵ or, more briefly, as an illegal conspiracy in restraint of trade.⁶ Much turns on the definition of the term, therefore, since as above defined the courts must of necessity condemn the boycott as unlawful.

¹ *Ex parte Williams*, (Cal.) 111 Pac. 1035.

² *City of St. Louis v. Gloner*, 210 Mo. 502, 109 S.W. 30.

³ *American Federation of Labor v. Buck's Stove & Range Co.*, 37 Wash. L. R. 154.

⁴ *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163, 3 Ry. & Corp. L. J. 561.

⁵ *Crump v. Com.*, 84 Va. 927, 2 S.E. 620; *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354.

⁶ *Walsh v. Ass'n. of Master Plumbers*, 97 Mo. App. 280, 71 S.W. 455.

"The law does not permit either employer or employee to use force, violence, threats of force, or threats of violence, intimidation, or coercion."¹

A broader definition has been offered, as that a boycott is "the act of a combination of persons in refusing to deal or in inducing others to refuse to deal with a third person,"² thus practically eliminating the distinction between a boycott and the mere act of refusing to deal, either singly or in consultation. Another definition of the same nature is that it is "the withdrawal for a certain purpose of the patronage of the person or persons initiating it, and of as many others as he or they can induce to join them";³ and in an opinion of the supreme court of New York it was said: "I think that the verb, 'to boycott,' does not necessarily signify that the doers employ violence, intimidation, or other unlawful coercive means; but that it may be correctly used in the sense of the act of a combination, in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or grants concessions which are deemed to make for that purpose."⁴ In the *Lindsay* case it was held that there is nothing unlawful in the act of union working men in withdrawing their patronage from the plaintiffs or from any other concern doing business with them, and that no fact of combination will make unlawful any act which an individual might lawfully do. "In other words, the mere combination of action is not an element

¹ *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721.

² *Cooke, Combinations, Monopolies, and Labor Unions*, p. 50.

³ *E. P. Cheney*, 4 Pol. Sci. Q. 274.

⁴ *Mills v. U. S. Printing Co.*, 91 N.Y. Supp. 185, 99 App. D. 605; adopted in *Lindsay v. Montana Fed. of Labor*, 37 Mont. 264, 96 Pac. 127.

which gives character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used in furtherance of the purpose, which makes the act illegal.”¹ In this case the court refused to continue an injunction against a boycott prosecuted largely by the distribution of a circular declaring the plaintiffs (wholesale and retail merchants) unfair, and calling on retailers and the public to withhold their patronage from them, asking them to do this “for your own protection and the protection of organized labor.” The supreme court of California took a similar view in a case² involving efforts to unionize the plaintiff’s business and the causing of loss through the cessation of trade relations with a number of former customers, leading in some instances to the violation of contracts. It was held that customers were entitled as a matter of fair dealing to know that the company had been declared unfair so that they would be able to avoid inconvenience and loss to themselves by breaking off their relations with the company, since no union workman would handle material purchased from it. A sufficient justification for the acts of the council, in so far as they were responsible for the violation of the contracts, was said to exist in the duty of the union to so warn the customers of the company. The situation was described as a bringing to bear upon the company the pressure of loss inflicted by third persons, with whom no controversy existed, by holding over those persons the risk of financial loss, thus compelling them to act against their own will. Such action was said to be nothing more than trade competition in an effort to secure the employment of union

¹ Citing *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N.W. 119; *Nat. Prot. Ass’n v. Cumming*, 170 N.Y. 315, 63 N.E. 369.

² *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027. See also *State v. Van Pelt*, 136 N.C. 633, 49 S.E. 177.

workmen to the exclusion of all not associated with them, and on terms deemed satisfactory and advantageous to the members of the union. Since each member was entitled to so act, all might so act in combination. "It may be that the combination of great numbers of men, as of great amounts of capital, has placed in the hands of a few persons an immense power, and one which, in the interest of the general welfare, ought to be limited and controlled. But if there be, in such combinations, evils which should be redressed, the remedy is to be sought, as to some extent it has been sought, by legislation. If the conditions require new laws, these laws should be made by the law-making power, not by the courts."

These cases stand quite clearly marked off from the great body of decisions on the point involved, since the boycott is generally, by its very definition, put without the pale of those combined activities which the law will permit. In a tolerably recent case it was said that the distinction between an ordinary lawful and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one. "Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state in the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England;"¹ and in a somewhat earlier case it was said that "no case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a

¹ *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803. It may be noted that in the State of Minnesota, boycotting, which was allowed in the case of *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N.W. 1119, was held to be properly enjoined in the later case of *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663. See also *Ertz v. Produce Exchange*, 79 Minn. 140, 81 N.W. 737.

boycott.”¹ While so sweeping a statement is not now possible, it remains true that boycotts are by most courts held unlawful even without public disturbance, physical injury, or direct threats of attacks on person or property;² since “the use of the word ‘boycott’ is itself a threat, and the distribution of boycott notices is intended as a menace, intimidation, and coercion.”³ Where the coercion consisted only in the enforcement of fines on members of the association conducting the boycott, it was still held to be unlawful, since it was no less an unlawful interference with business because accomplished by the enforcement of coercive fines on members than if it had been accomplished by coercive measures against nonmembers to compel them to aid in the boycott; and the fact that there was an initial agreement by all the members was not regarded by the court as warranting a finding that the continued withholding of patronage was also voluntary, when the failure to do so would have resulted in a heavy fine;⁴ the imposition of fines on nonmembers is unlawful.⁵

It is evident that it is the coercive feature of the boycott that discredits it so emphatically in the great majority of the courts. The mere refusal of individuals to deal would not be a violation of law, since individuals acting independently cannot

¹ *Casey v. Cincinnati Typographical Union*, 45 Fed. 135.

² *Barr v. Essex Trades Council*, 53 N.J. Eq. 101, 30 Atl. 881; *March v. Bricklayers, etc.*, 79 Conn. 7, 63 Atl. 291; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C.C.A. 311; *Purvis v. Carpenters & Joiners*, 214 Pa. St. 348, 63 Atl. 585.

³ *Brace Bros. v. Evans*, *supra*; *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N.W. 13; *Casey v. Cin. Typ. Union*, *supra*, etc.

⁴ *Boutwell v. Marr*, 71 Vt. 1, 42 Atl. 607; *Martell v. White*, 185 Mass. 255, 69 N.E. 1085.

⁵ *Purington v. Hinchcliff*, 219 Ill. 159, 76 N.E. 47; *Burke v. Fay*, 128 Mo. App. 690, 107 S.W. 408; *United States v. Raish*, 163 Fed. 911.

conspire nor can they intimidate the public acting alone.¹ "It has been decided, however, that while such action would not be unlawful by an individual, a combination and a conspiracy to accomplish the purpose would be an illegal act."² In the Hopkins case it was said that the definition of a boycott was not essential, since the evident purpose was, even if without violence, to so act by concert, force of numbers, and exciting the fears of the timid, as to compel many persons to surrender their freedom of action and submit to the dictation of others in the management of their private business affairs. "At common law every person has individually, and the public has also collectively, a right to require that the course of trade should be kept free from unreasonable obstruction;"³ nor can the ordinary methods of the boycott be justified as matter of trade competition;⁴ since the relations involved are not those of trade competitors engaged in rivalry for a market for their products; inducing one's employees to leave his service, or interfering with the employment of workmen, for the purpose of crippling his business, where the organization is not itself engaged in any business, competitive or otherwise, and has no need of labor, its only object being to compel the employer to

¹ Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S.W. 997.

² Oxley Stave Co. v. Coopers' International Union, 72 Fed. 695, citing Arthur v. Oakes, 63 Fed. 310; affirmed in Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C.C.A. 99; see also Lohse Patent Door Co. v. Fuelle, *supra*.

³ Erle, Trade Unions, cited with approval in Loewe v. Lawlor, 208 U.S. 274, 28 Sup. Ct. 301; Purington v. Hinchcliff, *supra*; Jersey City Printing Co. v. Cassidy, 63 N.J. Eq. 759, 53 Atl. 230; Branson v. Industrial Workers of the World, *supra*, etc.

⁴ March v. Bricklayers, etc., *supra*; George Jonas Glass Co. v. Glass Bottle Blowers, 72 N.J. Eq. 653, 66 Atl. 953; My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721; *per contra*, J. F. Parkinson Co. v. Building Trades Council, *supra*.

concede the desired terms to the organization, is said not to be the competition which the law recognizes or upholds. Nor is the publication of boycott notices within the protection of the right of free speech and a free press,¹ since with the right of free speech there is a guarantee of other rights and liberties, and it is a maxim of jurisprudence that each one must so use his own rights as not to infringe upon the rights of another;² and it has been said that it would be strange indeed if the right of free speech could be used to sustain the carrying out of an unlawful and criminal conspiracy.³ It has been contended against this view that the restraint of publication cannot be effected by the courts, since courts will not interfere with the publication of a libel, but will leave the parties to their freedom of action, subject to liability for the consequences.⁴ But "there is a

¹ *Loewe v. California State Fed. of Labor*, 139 Fed. 71; *Crump v. Com.*, 84 Va. 927, 6 S.E. 620; *Shine v. Fox Bros. Mfg. Co.*, *supra*; *Beck v. Ry. Teamsters, Prot. Union*, *supra*; *My Maryland Lodge v. Adt*, *supra*; *Buck's Stove & Range Co. v. American Fed. of Labor*, 35 Wash. L. R. 797; *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363; and see *Loewe v. Lawlor*, *supra*.

² *Jordahl v. Hayda*, 1 Cal. App. 696, 82 Pac. 1079. "While our republican government guarantees the right to pursue one's own happiness, yet that government is charged with the duty of protecting others than appellant in the pursuit of their happiness, and hence the inalienable right to pursue one's own happiness must necessarily be subject to the same right in all others. Hence, when that right is asserted in such a manner as to conflict with the equal right to the same thing in others, it is not an inalienable right at all, but is a wrong." *Townsend v. State*, 147 Ind. 624, 47 N.E. 19.

³ *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803.

⁴ *Marx & Haas Co. v. Watson*, 168 Mo. 135, 67 S.W. 391; *Lindsay v. Montana Fed. of Labor*, *supra*. In the former case it was said that there was no authority under the constitution for a distinction between proceedings to enjoin the publication of a libel and one to enjoin publications of any other sort, however injurious. "No halfway house stands between prevention and absolute freedom. . . . The two ideas, the one of absolute freedom to say, write, or publish whatever he will on any subject, coupled with the responsibility therefor, and the

clear distinction between suits to enjoin the publication of a libel, and one to restrain acts to intimidate persons from dealing with another. In the one, when the acts complained of consist of such misrepresentations of a business that they tend to its injury and damage to its proprietor, the offense is simply a libel; and in this country the courts have with great unanimity held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. On the contrary, when the attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with him, or laborers from working for him, the courts have, with nearly equal unanimity, interposed by injunction.”¹

A distinction is sometimes drawn between what are classed as primary and secondary boycotts. In the former, the action is directly against the offending employer, the members of the organization simply withholding their patronage as laborers or purchasers, and inducing their fellows to do the same. The mere withholding of patronage or refusal to trade is not unlawful,² and the announcement or publication of such a purpose is within the rights of the persons agreeing together, even though

other idea of preventing any such free speech, free writing, or free publication, cannot coexist.” The fact that the defendants were without funds or property that could be attached in a damage suit was said not to affect the situation, though it left the plaintiff company open to ruinous attacks with no possibility of recovery or redress. This case was commented on adversely in *Rocky Mountain Tel. Co. v. Montana Fed. of Labor*, 157 Fed. 821; and see *Lohse Patent Door Co. v. Fuelle*, *supra*.

¹ *Cœur d'Alene Consol. Min. Co. v. Miners' Union*, 51 Fed. 260; and see *Beck v. Railway Teamsters' Union*, *supra*; *Casey v. Cincinnati Typ. Union*, 45 Fed. 135; *Gray v. Building Trades Council*, *supra*.

² *Toledo, etc., R. Co. v. Penna. Co.*, 54 Fed. 730; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 323; *Hey v. Wilson*, 232 Ill. 389, 83 N.E. 928.

it results in the injury of the person against whom the acts are directed.¹ And it will follow that persons freely joining in such withholding of business intercourse will not by their acts inculpate either themselves or the original actors. But such is not the usual course of the boycott; and indeed the definitions usually adopted do not cover such acts, but are applicable only to the second class, or the so-called secondary boycotts (sometimes called compound boycotts), which are generally understood to mean combinations to harm one person by coercing others to harm him, as already set forth above. Exceptions to the practically uniform declaration as to the illegality of such boycotts are to be found where the employer extends or seeks to extend his activities by combinations with others of his class. Thus where an employer whose men are on strike sends material to be worked up by other employers, it is justifiable for sympathizers with the original strikers to withhold service from these other employers for the purpose of inducing them to refrain from dealing with him, and so seek to isolate him from business. "To whatever extent employers may lawfully combine and coöperate to control the supply and conditions of work to be done, to the same extent should be recognized the right of workmen to combine and coöperate to control the supply and the conditions of the labor that is necessary to the doing of the work."² The supreme court of

¹ *Gray v. Building Trades Council*, *supra*; *People v. McFarlin*, 89 N.Y. Supp. 597, 43 Misc. 591; *Pierce v. Stablemen's Union*, *supra*.

² *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631. See also *Sinsheimer v. United Garment Workers*, 77 Hun, 215, 28 N.Y. Supp. 321, where relief was denied an employer who was held not to have "come into court with clean hands," having himself employed methods similar to those of which he complained.

California "recognizes no substantial distinction between the so-called primary and secondary boycott," permitting strikers not only to withhold their own patronage, but also, "by threat of like boycott, to coerce others into doing so." However, it held illegal any act which tends to impair the right of free action by individuals by means passing beyond moral suasion and playing by intimidation upon the physical fears.¹ A dissenting opinion in the *Pierce* case pointed out what is no doubt a fatal weakness in the position taken by the majority, contending that the use of any means constituting duress, menace, or undue influence would render the boycott unlawful. "Whether this coercion or compulsion comes from fear of physical violence, as in the case of picketing, or from fear of financial loss, as in the 'secondary boycott,' or from fear of any other infliction, is, in my opinion, immaterial, so long as the fear is sufficiently potent to control the action of those upon whom it is cast."

In a few states boycotting is forbidden by statute, the term "boycott" being used for the most part without definition;² while in two other states concerted refusal to trade with dealers or manufacturers, or concerted action to interfere with their business, is made an offense.³ The effect of these statutes is slight, since they are little if any more than a declaration of the rules of the common law. "Neither at common law nor under statutes modifying the common law doctrine is it lawful for workmen to combine to injure another's business by causing his employees to leave his service by intimidation, threats,

¹ *Pierce v. Stablemen's Union*, *supra*; approving *Parkinson v. Building Trades Council*, *supra*, and citing as a supporting case *Lindsay v. Montana Federation of Labor*, *supra*.

² Ala., Code, sec. 6396; Colo., Acts 1905, ch. 79; Ill., Acts 1905, ch. 38.

³ Ind., A.S., sec. 3312m; Texas, Acts 1903, ch. 94.

molestation, or coercion.”¹ They have the effect, however, of declaring the policy of the state in regard to any possible departure from the rule laid down.

Besides the statutes prohibiting boycotting, a number of statutes have been referred to in boycott cases as violated by the acts complained of. Thus a statute of Wisconsin,² which penalizes combinations for the purpose of willfully or maliciously injuring the trade or business of another, was held to be constitutional and applicable in a case of a combination of a number of managers of newspapers to boycott a rival publisher.³ The legislature was held to have the power to make the question of motive a material one; nor can the right to punish malicious acts be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by such acts. This corresponds to the principles controlling in the doctrine of conspiracy, whether under statute or common law.⁴ A similar statute of New York⁵ was held to have like application in a boycott case in which there was neither violence nor threat of violence, where the combination was against builders who should buy materials of any dealer not approved by the union.⁶

The federal antitrust act⁷ was made the basis of an action against a labor organization which had largely reduced the sales

¹ 8 Cyc. 639, cited with approval in *Branson v. Industrial Workers of the World*, *supra*. ² A.S., sec. 4466a.

³ *Aikens v. Wisconsin*, 195 U.S. 194, 25 Sup. Ct. 3.

⁴ Sec. 118. And see *Purington v. Hincheliff*, *supra*.

⁵ Penal Code, sec. 168, subd. 5.

⁶ *People v. McFarlin*, *supra*. See also *Branson v. Industrial Workers of the World*, *supra*, where a boycott was undertaken to compel an employer to unionize his plant, the boycott being classed as a criminal conspiracy under sec. 4751, C.L. of Nevada.

⁷ 26 Stat. 209, U.S. Comp. St., p. 3200.

of the complainant's products by boycotts in various parts of the United States, and the court found that there was a punishable combination or conspiracy to interfere with trade or commerce among the several states, as prohibited by the statute.¹

Another federal statute that has been invoked is the provision forbidding attempts to defraud by the use of the United States mails.² In this case a fine was assessed against a manufacturing company by a union because of a refusal of demands to employ only union workmen. A boycott was declared against the company's products and notice thereof was mailed to its customers. This was held to be a violation of the statute, whether viewed as a means of inducing the payment of the fine to escape the boycott, or as a means of maintaining the boycott to the injury of the complainant's business.³

SECTION 123. *Blacklists.* — A blacklist is in brief a list of persons marked out for unfavorable discrimination in business or social relations. As the term is generally used, it applies to lists kept by groups or associations of employers for their mutual information as to workmen to whom employment will be refused on the basis of certain facts or alleged facts stated or assumed in connection with the placing of the names on the lists. A mere exchange of information, leaving each employer free to act on his own judgment in the case, is not, in the absence of statute, illegal.⁴ It has already been stated that the giving

¹ *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301. See also *Buck's Stove & Range Co. v. American Fed. of Labor*, 37 Wash. L. R. 822.

² R.S., sec. 5480, U.S. Comp. St., p. 3696.

³ *United States v. Raish*, 163 Fed. 911.

⁴ *Willis v. Muscogee Mfg. Co.*, 120 Ga. 597, 48 S.E. 177; *Boyer v. Western Union Tel. Co.*, 124 Fed. 246; *Wabash R. Co. v. Young*, 162 Ind. 102, 69 N.E. 1003; *Baker v. Ins. Co. (Ky.)*, 64 S.W. 913.

of recommendations or clearance cards at the termination of employment is not obligatory on the employer (sec. 14); but in any information which an employer offers he must avoid perversion of facts, as he will be liable for false or unfair statements concerning his workmen.¹ The same is true as to statements made maliciously or for purposes of wrongful interference with the relation of employer and employee; and where it appears that one is blacklisted "without cause or provocation," a suit for damages will lie if it is shown that the person so blacklisted was thereby cut off from opportunity for employment, to his injury.²

It has been said that a discharged employee cannot recover damages against one blacklisting him and so procuring his discharge, even though the act was malicious, unless there was coercion or deception, causing the discharge against the will or contrary to the purpose of the employer,³ but this view is not in harmony with what appears to be the better and more common opinion;⁴ and where a workman is blacklisted by a former employer, and others in association with the employer refuse employment because of the information given, the agreement

¹ *Willis v. Muscogee Mfg. Co.*, *supra*; *Hundley v. Louisville & N. R. Co.*, 105 Ky. 197, 48 S.W. 429; *St. Louis S.W.R. Co. v. Hixon* (Tex. Civ. App.), 126 S.W. 338. See also *Davis v. New England R. Pub. Co.*, 203 Mass. 470, 89 N.E. 565. (This case involved the omission of a firm name from a list of all local "reputable express companies.")

² *Mattison v. R. Co.*, 3 Ohio Dec. 526; *Willner v. Silverman*, 109 Md. 341, 71 Atl. 962; *Hundley v. Louisville & N. R. Co.*, *supra*; *Rhodes v. Granby Cotton Mills* (S.C.), 68 S.E. 824; see also *Willett v. Jacksonville, etc., R. Co.* (U.S. C. C., 1896, S. D. of Florida) in which the plaintiff obtained judgment in the amount of \$1700 for loss of employment with another company on account of a letter written by his former employer.

³ *Baker v. Ins. Co.* (Ky.), 67 S.W. 967.

⁴ *Joyce v. Great Northern R. Co.*, 100 Minn. 225, 110 N.W. 975; and cases in note 2, *supra*.

will be condemned as a conspiracy if the circumstances show it to be injurious and without warrant in fact.¹

A number of states have statutes prohibiting blacklisting.² The constitutionality of these statutes has been maintained, their purpose being to protect employees in their natural and constitutional right to sell their labor and acquire property.³ The Indiana statute refers only to the blacklisting of discharged employees, and is therefore held not to be applicable to cases where one voluntarily left service;⁴ while in construing the Minnesota statute, which names both those who leave voluntarily and those who are discharged, the court said that the fact that an employee left his place voluntarily does not give the employer the right to prejudice his employment elsewhere, and that it was not a sufficient answer that the employer may have cause for making the statement, or that it may be to the mutual advantage of all employers in an association, since if such were the facts in the case, they would not bar the action but would be available only as a matter of defense.⁵

SECTION 124. *Interference with Employment, Intimidation, etc.* — Not falling specifically under any of the foregoing heads and involving forms of collective action, thus differentiating them in some respects from the acts of individuals already considered (sec. 15), there are yet to be noticed some forms of

¹ Rhodes v. Granby Cotton Mills, *supra*. (Plaintiff was blacklisted as a striker, and so published, although it was clearly shown that he was not.)

² Ala., Code, sec. 6398; Conn., Acts 1909, ch. 153; Ind., A.S., sec. 7076; Minn., R.L., sec. 5097; N.C., Acts 1909, ch. 858; U.S., 30 Stat. 424, Comp. L., p. 3205.

³ State v. Justus, 85 Minn. 279, 88 N.W. 759; St. Louis S. W. R. Co. v. Hixon, *supra*; Joyce v. Great Northern R. Co., *supra*.

⁴ Wabash R. Co. v. Young, *supra*.

⁵ State v. Justus, *supra*.

interference with the employment of labor or the conduct of business by methods which the law does not sanction. It has been seen that the courts will take note of injuries inflicted or threatened where they follow the unwarranted and improper exercise of such powers as are possessed by a collective body, even though there be neither fraud nor coercion by violent means; and the unjustifiable interference by way of persuasion or the enticement of workmen, involving the violation of a contract not to become members of a union, has been held to entitle an employer to an injunction against members of a labor union who were seeking to unionize his plant;¹ but where such a complaint is made, and it appears that the employees are in fact members of the association complained of, the right of officials to confer with their membership, and the right of workmen to act singly or collectively in the matter of seeking improved conditions of employment, will operate to prevent the issue of an injunction against counseling and advising on such subjects.²

Employees who are members of a union may take the initiative and procure the restraint of a rival union which seeks to procure their discharge and the employment of no others than members of such rival union.³ The contrary view was taken in a case in which it was said that the object of the rival union to secure employment for its own members was sufficient justification for acts leading to the discharge of the complainants, though there was a strong dissenting opinion.⁴ In this case the

¹ *Flaccus v. Smith*, 199 Pa. St. 128, 48 Atl. 894; *Hitchman Coal Co. v. Mitchell*, 172 Fed. 963.

² *Wabash R. Co. v. Hannahan*, 121 Fed. 563.

³ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327.

⁴ *National Protective Ass'n. v. Cumming*, 170 N.Y. 315, 63 N.E. 369.

majority of the court seems to have lost sight of the rule of law that one man's rights end where another's begin. "An interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition."¹ The right to seek employment is an inherent one, and an association's noninterference with a workman in the exercise of that right is in no sense a ground for claiming that such an association had protected him in his employment or had conferred any legal benefit upon him, since it had no right to interfere with him in this respect;² and an unwarranted expulsion of a member, leading to his discharge from employment, will support an action for the recovery of damages for causing the discharge.³ It has also been held that a labor union may be enjoined from the expulsion of members in a manner intended to improperly influence their free action in the matter of employment, where such expulsion is a part of a number of intimidating and unlawful acts.⁴ An action for damages will lie where a nonunion workman is shown to be maliciously deprived of employment by reason of the action of a labor organization;⁵ so also if the discharged workman was

¹ *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603.

² *Levin v. Cosgrove*, 75 N.J.L. 344, 67 Atl. 1070.

³ *Campbell v. Johnson*, 167 Fed. 102, 92 C.C.A. 554; *Brennan v. United Hatters*, 73 N.J.L. 729, 65 Atl. 165.

⁴ *Connett v. United Hatters*, 76 N.J. Eq. 202, 74 Atl. 188.

⁵ *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297; *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. 96; *Berry v. Donovan*, *supra*. In the *Curran* and *Berry* cases the discharge was in consequence of contracts with employers to employ only members of unions, resulting in the discharge of plaintiffs from employment. In the case of *Perkins v. Pendleton*, the court said: "Merely to induce another to leave an employment, or to discharge an employee, by persuasion or argument, however whimsical, unreasonable, or absurd, is not, in and of itself, unlawful, and we do

a member of another union,¹ the rule of law being that any malicious interference with the contract relation will ground an action if damage ensues.² Where the action of a union not only interferes with the employment of the former members, expelled without just cause, but also seeks to control their conduct in matters of public duty, an added reason exists for restraint against further interference, while damages will be allowed for the loss of employment.³

The interference complained of may be of a more general sort, directed against the business of an employer by way of conspiracy. Where there is an agreement to induce one's employees to cease work and to refrain from working until some unauthorized mandate of those in agreement is complied with, the latter may be held and punished for conspiracy.⁴ Where

not decide that such interference may become unlawful by reason of the defendant's malicious motives, but simply that to intimidate an employer by threats, if the threats are of such a nature as to induce this result, and thereby cause him to discharge an employee whom he desired to retain, and would have retained except for such unlawful threats, is an actionable wrong."

¹ *Ruddy v. Journeymen Plumbers*, 79 N.J.L. 467, 75 Atl. 742.

² *Angle v. Chicago R. Co.*, 151 U.S. 1, 14 Sup. Ct. 240.

³ *Schneider v. Journeymen Plumbers, etc.*, 116 La. 270, 40 So. 700. In this case members of a union who were appointed by the mayor as examiners of plumbers applying for certificates in the city of New Orleans were fined and expelled for not choosing as inspector a member indicated by the union. They were also deprived of employment by reason of the loss of membership. The judgment in this case awarded restoration of membership, remission of the fines, damages, actual and punitive, and an injunction against further interference with their employment.

⁴ *State v. Dalton*, 134 Mo. App. 517, 114 S.W. 1132. (The members of two labor unions combined to secure the payment of a fine levied on an employer.) *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S.E. 353. (An association of printers and publishers combined to fix prices and prevent competition, and levied a fine against the Doctor Blosser Co. for accepting work in violation of the agreement. On his refusal to pay the fine his business was interfered with and his employees coerced into withdrawing from his service.)

intimidation and violence are used, there is of course no question of the illegality of the acts no matter how lawful the object in view might be ;¹ and unions giving financial support to strikers and pickets guilty of such unlawful conduct will be themselves liable for so aiding and abetting it.²

A number of statutes have been enacted directed to the subject of interference with employment, conspiracy against workingmen, intimidation, etc. Some of these apply to specific employments, as those prohibiting interference with or the intimidation or molestation of railroad employees,³ or seamen.⁴ More commonly, however, the acts are of general application and prohibit conspiracy against or interference with any lawful business by force or by threats of violence to person or property;⁵ or the use of means calculated or intended to intimidate or compel one against his will to do or refrain from doing any act which he has a legal right to do, or injury or threats of injury to person or property with intent to intimidate any person;⁶ or threats, violence, or intimidation preventing or attempting to prevent any person from engaging or remaining in any lawful business, employment, or occupation.⁷ These laws for the most part embody the principles of the common law relative to conspiracy or the unlawful infringement on the rights of others by coercion or other improper means. While they are

¹ *Purvis v. Carpenters and Joiners*, 214 Pa. St. 348, 63 Atl. 585.

² *Jones v. Maher*, 116 N.Y. Supp. 180, 62 Misc. Rep. 388.

³ Del., R.C., p. 928, sec. 3; Ill., R.S., ch. 114, secs. 109, 110; Ky. St., sec. 803.

⁴ La., R.L., sec. 944.

⁵ Ala., Code, secs. 6394, 6856.

⁶ Conn., Acts 1909, ch. 202.

⁷ Ga., Pen. Code, secs. 123-126; see also Ill., R.S., ch. 38, secs. 158, 159; Me., Acts 1903, ch. 127, sec. 21; Mass., Acts 1909, ch. 514, sec. 18; N.Y., C.L., ch. 40, sec. 530; Wash., Acts 1909, ch. 249, sec. 362.

penal in form and effect, subjecting their violators to penalties of fines or imprisonment,¹ their violation also operates to give a right of action to a party injured by the unlawful act.² "When such an injury results, from the execution of a conspiracy, it is the wrongful act done in carrying out the concerted plan, and not the conspiracy itself which furnishes the real ground for a civil action." In all the above cases the defendant or defendants were agents or members of labor organizations, and their actions were regarded as representing the force and influence of numbers. Thus in the Fischer case, it was said that "the accused was present, and professed to speak as the authorized agent of a large organization." In *Wyeman v. Deady*, "Deady was the business agent and so-called walking delegate of the defendant union, and did said acts not only with the knowledge and approval, but by the authority of the union," etc. This fact would bring the acts within the common law principle of conspiracy, while it was also true that the acts were unjustifiable interference with employment, usually by violent or coercive means, so that they would apparently have come under the condemnation of the law without statutory provision. But as remarked in another connection, such statutes have at least the effect of declaring the policy of the states in which they exist, and so have a measure of value.

SECTION 125. *Remedies by Suits at Law.* — It has frequently appeared in the foregoing sections that persons, employers or employees, may recover damages for injurious interference, without justification, with employment or business by acts

¹ *State v. Stockford*, 77 Conn. 227, 58 Atl. 769; *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *Fischer v. State*, 101 Wis. 23, 76 N.W. 594.

² *Wyeman v. Deady*, 79 Conn. 414, 65 Atl. 129; *Carter v. Oster*, 134 Mo. App. 146, 112 S.W. 995.

done in connection with labor disputes; and it only remains under this head to illustrate briefly the manner and extent of the application of this rule of law.

An employer is entitled to a judgment for damages where a union has unjustifiably caused injury on account of his failure to carry on his business according to the methods prescribed by the union.¹ In the *Carew* case a union levied a fine on an employing stonecutter, and coerced him into payment by procuring his workmen to leave him until he was unable to fill his contracts, the purpose being to enforce the closed shop. To compel one to yield to an illegal demand in order to secure the privilege of carrying on his business was said to be unlawful, if not actually a criminal conspiracy, and is "a species of annoyance and extortion which the common law has never tolerated." The judgment included the repayment to the employer of the amount of the fine, as well as damages. In order to recover a fine in such circumstances, it must appear that it was paid under coercion and to remove an actual obstacle to the conduct of business, since, if paid voluntarily or without duress, it will not be recoverable.² In the case of the *Old Dominion Steamship Company*, the union had interfered with the shipping of sailors, and declared a boycott because the company had refused to pay laborers in one locality the rates usually paid more skilled men in another locality. In the cases of the *F. R. Patch Mfg. Com-*

¹ *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Old Dominion S.S. Co. v. McKenna*, 30 Fed. 48; *F. R. Patch Mfg. Co. v. Int. Ass'n. of Machinists*, 77 Vt. 294, 60 Atl. 74; *O'Neil v. Behanna*, 182 Pa. St. 236, 37 Atl. 843; *Doremus v. Hennessy*, 176 Ill. 608, 52 N.E. 524; *Moores v. Bricklayers' Union*, 10 Ohio Dec. (Rep.) 645; *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354; *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 53 S.E. 161.

² *Burke v. Fay*, 128 Mo. App. 690, 107 S.W. 408. See also *March v. Bricklayers, etc.*, 79 Conn. 7, 63 Atl. 291.

pany and of *O'Neil v. Behanna*, coercive and unlawful means were used to sustain the demands of striking workmen. In the *Doremus* case the violation of contracts was procured by a laundrymen's association seeking to compel a general advance in prices.¹ In the case of *Moore v. Bricklayers*, members of a union had given notice that they would work no material purchased from a material man who had disregarded a boycott order issued by the union.² In the *Branson* case a union attempted to procure the discharge of members of another union unless they would join the defendant union. In the case of the *Thacker Coal Company*, members of the union were held to be liable in damages for procuring workmen under contract to leave employment, in an effort to unionize the mine.

A leading case involving the right of an employee to damages where union activities prevent his employment is one in which an agreement between a union and an association of employers provided that the latter would employ no one not a member of the union for a longer period than four weeks, within which time he should become a member of the union or be discharged.³ The plaintiff declined to become a member, and was discharged accordingly. In the suit against the union the only defense offered was the contract. The court held that the principle of this contract was "glaringly at variance with that freedom in the pursuit of happiness which is believed to be guaranteed to all by the provisions of the fundamental law of the state," and that the effectuation of the purpose expressed in it "would conflict with

¹ See also *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 50 S.E. 353.

² See also *Purinton v. Hinchcliff*, 219 Ill. 156, 76 N.E. 47; *Purvis v. Carpenters, etc.*, 214 Pa. St. 348, 63 Atl. 585.

³ *Curran v. Galen*, 152 N.Y. 33, 46 N.E. 297.

that principle of public policy which prohibits monopolies and exclusive privileges." The plaintiff, Galen, was therefore declared to be within his rights in suing for damages resulting from the procurement of his discharge. The fact that the contract was such as to bar nonunion men from all employment locally was held to put this case on a different footing from one in which the contract was between a union and but a single employer.¹ It was said in the Jacobs case that the doctrine of the Curran case had not been overruled by the opinion in a case in which was upheld the right of an organization to threaten strikes so as to procure the discharge of workmen in order to secure the employment of members in their stead.² The dissenting opinion in the Cumming case, however, was to the effect that the doctrine of *Curran v. Galen* required a contrary finding in the case in hand. In Massachusetts it is consistently held that an employee is entitled to damages where his discharge results from a combination of persons to obtain it because he refuses to become a member of the union or act otherwise for their advantage in a matter in which he has the right to act independently.³

Not only actual but punitive damages may be awarded a workman whose employment has been maliciously, *i.e.*, intentionally and unjustifiably, interfered with; and where such interference is the action of an acknowledged representative of a union, and is directed or approved by the latter, both he and it are liable as joint tort feorsors.⁴ Where loss of employment

¹ *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5.

² *National Prot. Ass'n. of Steamfitters, etc., v. Cumming*, 170 N.Y. 315, 63 N.E. 369.

³ *Berry v. Donovan*, 188 Mass. 359, 74 N.E. 603; citing many cases. A judgment against Donovan, a representative of the union, in the sum of \$1500 was affirmed.

⁴ *Wyeman v. Deady*, 79 Conn. 414, 65 Atl. 129.

follows unlawful expulsion from a union, damages are recoverable, as well as an order for reinstatement.¹ Damages may include not only the actual wages lost, but may also cover the loss of rank, damages to reputation, and the hindering of the complainant's prospects of advancement.²

The judgment for damages may lie against the persons active in carrying out the purposes of the union,³ or against the union as such,⁴ or against individual members and the union.⁵ Where a judgment against a union is unsatisfied, the amount may be recovered against the individual members;⁶ and, in general, all the parties to a wrongful agreement are liable for illegal acts done in the carrying out of the agreement.⁷ The fact of criminal liability does not affect the right of injured persons to bring civil actions for the recovery of damages.⁸ In a number of cases where unincorporated unions were held liable in damages, it was by virtue of a statute fixing their status, the common law rule generally observed being to the effect that such bodies cannot, as such, either sue or be sued.

¹ *Schneider v. Journeymen Plumbers, etc.*, 116 La. 270, 40. So. 700; *Brennan v. Hatters*, 73 N.J.L. 729, 65 Atl. 165; *Blanchard v. Carpenters & Joiners*, 77 N.J.L. 389, 71 Atl. 1131.

² *De Minico v. Craig*, 207 Mass. 593, 94 N.E. 317.

³ *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003; *Curran v. Galen*, *supra*; *O'Neil v. Behanna*, *supra*; *Carew v. Rutherford*, *supra*.

⁴ *F. R. Patch Mfg. Co. v. Int. Ass'n. of Machinists*, *supra*; *Branson v. Industrial Workers of the World*, *supra*; *Brennan v. Hatters*, *supra*; *Schneider v. Journeymen Plumbers*, *supra*; *Jones v. Maher*, 116 N.Y. Supp. 180, 62 Misc. Rep. 388.

⁵ *Wyeman v. Deady*, *supra*.

⁶ *F. R. Patch Mfg. Co. v. Capeless*, 79 Vt. 1, 63 Atl. 938.

⁷ *Purington v. Hinchcliff*, *supra*, and cases cited; *Toledo, etc., R. Co. v. Penna. Co.*, 54 Fed. 730; *F. R. Patch Mfg. Co. v. International Ass'n. of Machinists*, *supra*.

⁸ *Underhill v. Murphy*, 117 Ky. 640, 78 S.W. 482; *Purvis v. Carpenters & Joiners*, *supra*; *Wyeman v. Deady*, *supra*.

SECTION 126. *Injunctions*. — A remedy in more common use than the suit for damages is the preventive remedy of the injunction or restraining order which issues from a court of equity for the purpose of preventing injury or of preserving the status quo until final determination of rights can be had. Though coming more widely into public notice in recent years on account of its use in important labor disputes, the writ of injunction is of ancient origin, its counterpart existing in the decretal of the Roman law.¹ While injunctions are most commonly restrictive or prohibitory in their operation, the mandatory injunction, ordering the performance of a specified act, is not unknown, at least to the extent of requiring the rendering of the service or the performance of the work or duty which is incumbent on the enjoined party in the premises.² The writ is most frequently invoked, however, so far as concerns the present study, to restrain the commission of injurious and unlawful acts in the furtherance of labor disputes, as picketing, boycotting, the distribution of unfair lists, and other forms of activity which are classed as coercive, intimidating, or as unjustifiably interfering with employment or business.

The injunction is classed as an extraordinary remedy, and is

¹ Bouvier, Law Dict.

² Toledo, etc., R. Co. v. Pennsylvania Co., 54 Fed. 730; Lennon v. Lake Shore, etc., R. Co., 22 U.S. App. 561; *In re Lennon*, 166 U.S. 548, 17 Sup. Ct. 658. In this case the Pennsylvania Co. had sought to avoid difficulty with its workmen by refusing to handle cars or freight from the complainant road, against which a strike was in progress. The court enjoined the Pennsylvania company and its officers and employees from refusing to afford the complainant road equal facilities to those furnished other companies. This left all defendants free to cease all railway service or employment, but obligated them, if they furnished any, to furnish it to all alike. It was Lennon's refusal to do this, while still remaining in service as a locomotive engineer, that brought him under the judgment of the courts.

to be resorted to only when the remedy at law is inadequate, "depending on whether the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money; or whether full compensation for the entire wrong can be obtained without resort to a number of suits."¹ While no final decree will be made without a hearing of both parties, a preliminary or interlocutory decree may be issued at the instance of one party, who must show not merely possible or probable danger of interference with his rights or property, but that the injury is either already occasioned and will continue unless enjoined, or that it is so imminent as to warrant the intervention of the court. Other facts to be shown are the irresponsibility, from a financial standpoint, of the parties against whom the injunction is sought; their numbers, making suits at law numerous and burdensome; and the preponderance of the threatened loss of the complainant over the inconvenience of the respondents which would follow the issue of the writ; though not all of these would be required in a single instance.²

Injunctions are granted only by courts of equity, and only in cases of equitable cognizance according to the established principles of equity jurisdiction. Since the purpose of the injunction is chiefly to maintain present conditions, and it is without power to procure the restoration of conditions already changed, it is said that an injunction will not issue relating exclusively

¹ *Barr v. Essex Trades Council*, 53 N.J. Eq. 101, 30 Atl. 881.

² *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721; *Sherry v. Perkins*, 147 Mass. 212, 17 N.E. 307; *Cœur d'Alene Co. v. Miners' Union*, 51 Fed. 260; *In re Debs*, 158 U.S. 564, 15 Sup. Ct. 900; *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901.

to acts already committed.¹ It may be issued, however, even after the termination of a strike, on the ground that the right to relief is to be determined by the status existing at the time of the filing of the bill.² An injunction will not issue to restrain the commission of criminal acts, merely as such, but where such acts involve injuries to property or property rights for which the law does not afford redress within the principles laid down above, equity will intervene by means of the injunction, even though the prohibited acts would be punishable by the state as criminal.³ Where there is no adequate proof of intimidation or impending danger, no writ will be granted;⁴ actual violence is not necessary, however, to ground a successful complaint, since the numbers of the striking employees, their positions, attitudes, looks, ridicule, threats, etc., may produce intimidation and coercion against which an injunction will be allowed.⁵ The free use of streets, free access to works, and freedom from insulting or otherwise objectionable treatment, both at home and in public places, are among the rights of every citizen; and an employer's interest in such rights for his employees and cus-

¹ *Reynolds v. Everett*, 144 N.Y. 189, 39 N.E. 72; *De Minico v. Craig*, 207 Mass. 593, 94 N.E. 317; *City of Alma v. Loehr*, 42 Kans. 368, 22 Pac. 424.

² *U.S. v. Workingmen's Amalgamated Council*, 54 Fed. 944. ("Rights do not ebb and flow. If they are invaded, and recourse to courts of justice is rendered necessary, it is no defense to the invasion of a right that since the institution of the suit the invasion has ceased. With emphasis would this be true where, as here, the right to invade is not disclaimed.")

³ *Sherry v. Perkins*, *supra*; *Cœur d'Alene Co. v. Miners' Union*, *supra*; *United States v. Elliott*, 62 Fed. 801; *Arthur v. Oakes*, 63 Fed. 310, 11 C.C.A. 209; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324.

⁴ *Everett-Waddy Co. v. Richmond Typ. Union*, 105 Va. 188, 53 S.E. 273; *Rogers v. Evart*, 17 N.Y. Supp. 264.

⁵ *Barr v. Essex Trades Council*, *supra*; *Jordahl v. Hayda*, 1 Cal. App. 696, 82 Pac. 1079.

tomers, actual or potential, is sufficient to support a complaint from him and to secure an injunction on a proper showing of facts.¹ In general, it may be said that what acts will warrant the intervention of a court of equity will be determined by the circumstances in each case rather than by any general rule, and in deciding the matter the courts will consider the spirit and intent, and not merely the form and letter, of the act or word.²

An injunction may issue on the initiative of the state, to abate a public nuisance, such as the obstruction of a highway or interference with the transportation of the mails;³ and the fact that the act enjoined would be an offense punishable criminally does not interfere with the issue of the writ.⁴ In the *Debs* case, involving obstruction of the mails and of interstate traffic, it was said by the Supreme Court: "It must be borne in mind that this bill was not simply to enjoin a mob and mob violence. It was not a bill to command a keeping of the peace; much less was its purport to restrain the defendants from abandoning whatever employment they were engaged in. The right of any laborer, or any number of laborers, to quit work has not been challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried."

In line with the above, it is true that no injunction will issue to restrain a libel or slander, merely as such; and this fact has

¹ *American Steel & Wire Co. v. Wire Drawers' Union*, 90 Fed. 608; *In re Debs*, *supra*; *Jersey City Printing Co. v. Cassidy*, 63 N.J. Eq. 759, 53 Atl. 230.

² *Cœur d'Alene Co. v. Miners' Union*, *supra*.

³ *Att'y General v. Ice Co.*, 104 Mass. 239; *State v. Goodnight*, 70 Texas 682, 11 S.W. 119; *U.S. v. Debs*, 64 Fed. 724; *In re Debs*, *supra*.

⁴ *In re Debs*, *supra*; *Port of Mobile v. R. Co.*, 84 Ala. 115, 4 So. 106.

been relied upon by parties publishing unfair lists, boycott notices, and the like, as a defense against the issue of an injunction to restrain such publications. It is held by the weight of authority, however, that they may properly be enjoined, not as libels, but as intimidating and coercive.¹ "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published, gives the words 'unfair,' 'we don't patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."² It has been held, however, that a finding containing "no allegations that the mere notification of customers that plaintiffs are 'unfair' has any special significance, that it portends injury, or was intended as a threat or intimidation," would not sustain an injunction forbidding the notification of customers that the plaintiffs were unfair;³ though it seems hardly too much to say at the present time that the word has acquired a technical signification of which the courts might take cognizance, especially where the use of the word is one of a series of acts of which the others are enjoinable.⁴ Where an injunction has been granted restraining

¹ *Cœur d'Alene Co. v. Miners' Union*, *supra*; *Beck v. Railway Teamsters' Prot. Union*, 118 Mich. 497, 77 N.W. 13; *Casey v. Typographical Union*, 45 Fed. 135.

² *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492. See *per contra*, *Marx & Haas Jean Clothing Co. v. Watson*, 168 Mo. 133, 67 S.W. 391; *Lindsay v. Montana Fed. of Labor*, 37 Mont. 264, 96 Pac. 127.

³ *Gray v. Building Trades Council*, 91 Minn. 171, 97 N.W. 663.

⁴ *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011; *Loewe v. Cal. State Fed. of Labor*, 139 Fed. 71; *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363.

interference with business, newspaper publications inciting to a violation of the injunction will themselves be enjoined, not as depriving the periodical in question "of any lawful right to publish the truth or express its opinion in a lawful manner; but no newspaper has the right to publish any matter intended to aid wrongdoers in accomplishing a wrongful purpose or doing unlawful things, or to aid unlawful combinations in making effective an unlawful conspiracy." ¹

Questions of the jurisdiction of state and federal courts are determined by the same tests of diversity of citizenship of the parties, or of the consideration of federal questions, as in other classes of cases. Thus where in an injunction proceeding brought by a Missouri corporation, involving defendants resident in Missouri and in Kansas, the case against the former was dropped in proceedings before a federal court, which left the case properly in the hands of that court.² Though if a federal court has jurisdiction of an original case, it may issue an injunction therein without regard to the citizenship of the parties.

A bond is usually required before a preliminary injunction will issue, to cover any loss or damage that may accrue to the

¹ Telephone Co. v. Kent, 156 Fed. 173.

² Hopkins v. Oxley Stave Co., 83 Fed. 912, 28 C.C.A. 99. The states have not accepted with equal readiness the principles of equity or made equally free use of it in its application to labor questions, while federal courts have been governed by a law declaring their full equity jurisdiction, and have doubtless felt a mutual and general influence more readily than has been the case with the state courts. These facts may in part account for a somewhat widespread feeling that the writ of injunction, especially as used in labor disputes, is peculiarly an instrument of the federal courts. It seems, however, that, apart from cases involving federal receiverships, injunctions in labor disputes were first used by state courts; and it is said that the rights of state and federal courts in regard to the issue of injunctions are "precisely the same." Union P. R. Co. v. Ruef, 120 Fed. 102.

defendant if it shall appear at the final hearing that the order was not a proper one, though the giving of such bond is a matter of statutory regulation. The injunction becomes effective only on the filing of the bond, if one is required, but is then binding on the parties to whom it is directed after they have had notice, without the necessity of a formal service of the writ. The order is also binding upon all other persons whatsoever, even if not named therein, from and after the time when they have actual knowledge of its existence.¹ Questions of validity are determinable by the courts, and a defendant believing his rights to be infringed upon by the granting of an injunction has recourse only to them. Disobedience is at his peril so long as the injunction is in existence, no matter how erroneously or improvidently it was granted,² since "if a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."³ "If an injunction is for any reason totally invalid, no violation of it constitutes a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ."⁴ A su-

¹ *Ex parte Lennon*, 64 Fed. 320; *United States v. Agler*, 62 Fed. 824; *In re Lennon*, *supra*.

² *A. R. Barnes & Co. v. Typographical Union*, 232 Ill. 402, 83 N.E. 932; *Carr v. District Court*, 147 Iowa 663, 126 N.W. 791.

³ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492; and see *Huttig Sash & Door Co. v. Fuelle*, *supra*; *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N.W. 1095.

⁴ *United States v. Debs*, 64 Fed. 724; *Ex parte Watkins*, 3 Peters 193, 28 U.S. 119.

perior court cannot interfere to prevent an inferior court from issuing injunctions where the latter clearly has jurisdiction over the matter in question.¹ The question of appeals from orders granting injunctions is controlled chiefly by statute, and it is held as the better view that in the absence of legislative provision no appeal will lie in cases involving preliminary injunctions;² and even where the appeal is allowed, the superior courts are averse to any free exercise of its use, requiring a definite showing of the abuse of the discretion committed to courts having power to issue injunctions, so that unless it is shown that the writ was illegally or improvidently granted, it will not be disturbed;³ and where a writ is set aside for these reasons, and was not technically void from the first, prior violations of it are punishable, since it is in force until set aside by proper proceedings in court.⁴ Appeals may be taken from final injunctions, but the appeal does not suspend the operation of the restraining order; and to hold the contrary would obviously make it possible to thwart the entire purpose of the injunction in many cases; the court issuing the injunction may punish violators of it for contempts committed during the pendency of the appeal,⁵ as may also the appellate court, since a disregard of the injunction under review is a contempt of the court to which it is to be or has been submitted.⁶ The same rule holds where a temporary

¹ *State v. Judge*, 29 La. Ann. 360.

² *United States Heater Co. v. Iron Molders' Union*, 129 Mich. 354, 88 N.W. 889; *High, Injunctions*, 4th ed., sec. 1693.

³ *Bonaud v. Genesi*, 42 Ga. 639; *Workingman's Amalgamated Council v. United States*, 57 Fed. 85, 6 C.C.A. 258.

⁴ *Worden v. Searls*, 121 U.S. 14, 7 Sup. Ct. 814.

⁵ *Worden v. Searls*, *supra*; *Bucks Stove & Range Co. v. American Fed. of Labor*, 36 Wash. L. R. 822; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492; *A. R. Barnes & Co. v. Chicago Typographical Union*, *supra*.

⁶ *Savings Bank v. City of Clay Center*, 219 U.S. 527, 31 Sup. Ct. 295.

injunction has been continued during the pendency of an appeal.

Labor organizations may be made parties to injunction proceedings, whether incorporated or not,¹ and the writ may be directed against the union, its officers and members, and other persons named in the bill, if any, and all other persons associated with them in committing the acts and grievance complained of. It is therefore impossible to evade the force of the writ by bringing in third parties to carry out the plans of the enjoined members of the union, since the action of such parties would amount to a wrongful and unlawful uniting with the restrained persons for the purpose of thwarting the effect of the writ; and the fact of knowledge of the writ is the only essential to charge liability under it, regardless of the omission of subpoenas or formal service of notice.² On the other hand, if only certain officials or a limited number of the members are guilty of the illegal acts complained of, the orderly conduct of a lawful strike will not be interfered with by an injunction against all the members, but the writ will run only against those persons who have committed the objectionable acts.³ This seems to differ somewhat from the views held by courts issuing the so-called "blanket injunctions," binding upon persons named "and

¹ *Loewe v. Cal. State Fed. of Labor*, *supra*; *Purvis v. Brotherhood*, 214 Pa. St. 348, 63 Atl. 585; *American Steel & Wire Co. v. Wire Drawers' Union*, *supra*; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631.

² *In re Bessette*, 111 Fed. 417; *Bessette v. Conkey*, 194 U.S. 324, 24 Sup. Ct. 665. ("Jurisdiction [over a third person] exists by reason of the conspiracy to defeat the process of the court, although such person is a stranger to the suit, and, by reason of his citizenship, could not have been made a defendant therein [in a case before a federal court].")

³ *Karges Furniture Co. v. Woodworkers' Union*, 165 Ind. 421, 75 N.E. 877; *Pope Motor Car Co. v. Keegan*, 150 Fed. 148; *Union P. R. Co. v. Ruef*, *supra*.

upon all other persons whatsoever who are not named therein, from and after the time when they shall severally have knowledge of such order and the existence of said injunctions.”¹ Apart from the liability to pay costs, which attaches to one named in an injunction, the actual difference is sentimental and theoretical rather than practical, however, as was set forth in one of the cases in which the names of apparently innocent defendants were stricken from the bill, the court stating that inclusion was not necessary to hold them to a strict compliance with the terms of the injunction after knowledge thereof;² and when defendants do not claim that the injunction restrains them from doing anything which they have a right to do, or which they have a desire to do, and the sole objection to the injunction is that it is unnecessary, the objection being urged because of the erroneous notion that the vacation of the injunction is a vindication of the defendants, comparatively slight evidence of the usefulness or necessity of the injunction is sufficient to sustain a temporary order until final hearing.³

It has already been pointed out that labor combinations have been made the subject of legislative action intended to declare their status as lawful and not subjecting the members thereof to indictment as conspirators. A statute of New Jersey⁴ declares it not unlawful for persons to combine to persuade, advise, or encourage by peaceable means others to enter into a combination for or against leaving or entering employment. This seems to have been construed as legalizing private injuries;⁵ and was

¹ *United States v. Debs, supra.*

² *Pope Motor Car Co. v. Keegan, supra*; see also *In re Lennon, supra*; *Boyd v. State*, 19 Neb. 128, 26 N.W. 925.

³ *Hall Lace Co. v. Javes*, 76 N.J. Eq. 92, 79 Atl. 439. ⁴ G. S., p. 2344, sec. 23.

⁵ *Mayer v. Journeymen Stonecutters*, 47 N.J. Eq. 519, 20 Atl. 492.

held to permit the adoption of peaceable measures for inducing workmen to quit or to refuse to enter employment.¹ In a later case, however, the court of errors and appeals of the state held that, so construed, the law conflicted with the state constitution in its provisions as to the right of enjoying and defending life and liberty, and of acquiring, protecting, and possessing property, and that it could go no farther than to render combinations of the sort not indictable.² An injunction against procuring violations of contracts, whether for fixed terms or at will, was sustained in this case, as well as against coercive measures to prevent the flow of labor to the complainant's works. And clearly no law is constitutional which removes unjustifiable acts of interference with employment or occupation from the general control of the law. A statute of California³ undertook specifically to exempt from control by injunction acts done in furtherance of disputes between employers and employees. This statute was pleaded in a strike case involving the boycott and picketing, whereupon the court held that it could not be construed as undertaking to prohibit a court from enjoining unlawful acts, and if it could be so construed, it was to that extent void as violative of the plaintiff's rights of liberty and protection.⁴

It is clear that the injunction relates to injury to intangible rights no less than to injury to physical property. "The right to choose one's calling is an essential part of the liberty which it is the object of the government to protect; and a calling

¹ *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers*, 59 N.J. Eq. 49, 46 Atl. 208.

² *George Jonas Glass Co. v. Glass Bottle Blowers*, 77 N.J. Eq. 219, 79 Atl. 262.

³ Acts 1903, ch. 235.

⁴ *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806; *Pierce v. Same*, 156 Cal. 70, 103 Pac. 324.

when chosen is one's property and right."¹ The occupation by means of which a man earns a livelihood and supports those dependent upon him is property within the meaning of the law, and entitled to protection as such.² Employers and workmen are entitled to free opportunity of mutual access and the free exercise of choice in the matter of making and carrying out contracts of employment, and injunctions will issue to protect such rights.³ These rights extend no less to prospective or mere possible employees than to those already in service, and to customers actual or possible as well.⁴ In the case, *Jersey City Printing Co. v. Cassidy*, a doctrine of "probable expectancies" was proposed as an underlying principle, the court suggesting that it would probably be ultimately concluded "that the natural expectancy of employers in relation to the labor market, and the natural expectancy of merchants in respect to the merchandise market, must be recognized to the same extent by courts of law and courts of equity," involving freedom in the labor market to employ or to be employed.

While injunctions of this nature usually issue at the instance of the employer, workmen or groups of workmen may secure such orders against other workmen or organizations who are interfering with their opportunities for employment.⁵ If it appears to the court, however, that the defendants are not

¹ *Slaughter House Cases*, 16 Wall. (83 U.S.) 36.

² *Gray v. Building Trades Council*, *supra*; *Beck v. Railway Teamsters' Prot. Union*, *supra*.

³ *Jersey City Printing Co. v. Cassidy*, *supra*; *American Steel & Wire Co. v. Wire Drawers' Union*, *supra*; *Union P. R. Co. v. Ruef*, *supra*.

⁴ *Beck v. Railway Teamsters' Union*, *supra*; *Goldberg v. Stablemen's Union*, *supra*; *Jersey City Printing Co. v. Cassidy*, *supra*.

⁵ *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011; *Erdman v. Mitchell*, 207 Pa. St. 79, 56 Atl. 327; *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753.

exceeding their rights in their efforts to secure labor for their own members and in the methods adopted, no injunction will issue.¹ Nor can one union secure an injunction against another to protect itself against disintegration by the acts of the rival union, since it has no property in its members, who, if aggrieved, must seek redress as individuals, the court holding that the union as such could not bring an action, even though the acts of the rival union were of an illegal nature;² nor has a union such an interest in the employment of its members as pickets in a strike which it is conducting as to warrant the issue of an injunction on its petition to prevent interference with such employment, where it does not appear either that the complainants are suffering substantial pecuniary damage, or that the defendants are not financially responsible for any damages that may result.³

On a suit for injunction a court may retain jurisdiction of the case in order to give such full relief as will finally dispose of the controversy and avoid multiplicity of suits.⁴ Thus in considering the propriety of issuing the injunction, it may also consider what damage, if any, the complainant has suffered by reason of the acts complained of, and award such amount as seems just;⁵ and this is of course equally true whether the complainant is an employee⁶ or an employer.⁷

¹ National Protective Ass'n. v. Cumming, 17 N.Y. 315, 62 N.E. 369.

² Silver State Council v. Rhodes, 7 Colo. App. 211, 43 Pac. 451.

³ Atkins v. Fletcher Co., 65 N.J. Eq. 658, 55 Atl. 1074.

⁴ Braman v. Foss, 204 Mass. 404, 90 N.E. 563; Gormley v. Clark, 134 U.S. 338, 10 Sup. Ct. 554; Bispham's Equity, 6th ed., sec. 37.

⁵ Baldwin v. Association, 162 Mich. 703, 130 N.W. 214; Purvis v. Brotherhood, *supra*.

⁶ De Minico v. Craig, 207 Mass. 593, 94 N.E. 317.

⁷ Folsom v. Lewis (Mass.), 94 N.E. 316.

There is little dispute as to the propriety of the issue of the injunction in circumstances involving the conditions set forth above; but there is wide difference of opinion as to when the point has been reached at which intervention is proper. This difficulty is pointed out in the matter of the boycott in a noted case in the following language: "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business of property of the complainant. Some hold that a boycott against the complainant by a combination of persons not immediately connected with him in business can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do so they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of violence."¹ It is settled by a strong line of cases that the contention that what one may lawfully do alone many may do in concert is not tenable, so that an injunction will lie to prevent certain forms of combined action, though one alone doing the same thing would not be interfered with.² Yet an injunction against workmen so quitting service, whether with or without notice, as to cripple the business or hinder its continuance,³ was on appeal modified so

¹ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492.

² *U.S. v. Kane*, 23 Fed. 748; *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 30 Sup. Ct. 535; *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155; *Jersey City Printing Co. v. Cassidy*, *supra*; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 21, 114 S.W. 997.

³ *Farmers' L. & T. Co. v. Northern P. R. Co.*, 60 Fed. 803.

as to omit the words restraining departure from service, though sustaining prohibitions of combinations and conspiracies having the object and intent of physically injuring the property or of actually interfering with its regular and continuous use.¹ The line drawn in some states by statutes forbidding the abandonment of rolling stock of railroads at other than division points or terminals affords a standard where applicable.

It is equally difficult to harmonize the rulings of the courts in regard to persuasion. "Persuasion, too emphatic, or too long and persistently continued, may itself become a nuisance, and its use a form of unlawful coercion,"² when, of course, it would be enjoined; and it has been very recently held that an injunction against inducing or persuading an employee under contract to render service to break such contract, and against "addressing persons willing to be employed, against their will, and thereby causing them personal annoyance, with a view to persuade them to refrain from such employment," was properly issued;³ and in another case in the same court it was held in effect that the right to persuade existed only as to persons willing to listen to the arguments offered, since only thus can the free flow of labor and the exercise of freedom of choice, unrestrained by annoyance or coercion, be maintained.⁴ This consideration prevailed to sustain the granting of an injunction against a labor organization to prevent it from fining or threatening to fine its members unless they should withdraw their service from an

¹ *Arthur v. Oakes*, 63 Fed. 310, 11 C.C.A. 209.

² *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 698.

³ *George Jonas Glass Co. v. Glass Bottle Blowers*, 72 N.J. Eq. 653, 66 Atl. 953; affirmed, 77 N.J. Eq. 219, 79 Atl. 262.

⁴ *Frank v. Herold*, 63 N.J. Eq. 443, 52 Atl. 152; see also *Jersey City Printing Co. v. Cassidy*, *supra*; *Goldfield Consol. Min. Co. v. Miners' Union*, 159 Fed. 500; *Union P. R. Co. v. Ruef*, *supra*.

employer against whom a strike had been declared, the court holding that any other conclusion would be inconsistent with the existence of a reasonably free labor market, to which both the employer and the employee are entitled.¹

While it is well settled that a strike, viewed as a concerted cessation of workmen from labor, cannot be enjoined, the incitement of strikes may be a proper subject of restraint, as where there is a conspiracy involving interference with interstate commerce;² and it was held in the case cited that a mandatory injunction might issue against the head of such conspiracy, compelling him to rescind an offending order; and incitement may be enjoined if the strike would involve the breach of contracts of employment;³ or has for its object a monopolistic purpose, as by preventing the employment of any but members of a labor organization.⁴ This last is a much-disputed point, however,⁵ and the question is often decided according to the adjudged motives of the strikers.⁶ Where the strike partakes of the nature of a boycott, it is generally held that acts tending to incite it may be enjoined.⁷ Clearly third persons, unrelated to the parties affected by either employment contracts

¹ *L. D. Willcut & Sons Co. v. Bricklayers*, 200 Mass. 110, 85 N.E. 897; and see *Connett v. Hatters*, 76 N.J. Eq. 202, 74 Atl. 188.

² *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 730.

³ *A. R. Barnes & Co. v. Berry*, 156 Fed. 72; *Wabash R. Co. v. Hannahan*, 121 Fed. 563.

⁴ *Erdman v. Mitchell*, *supra*; *State v. Donaldson*, 32 N.J.L. 151, 90 Am. Dec. 640; *Plant v. Woods*, *supra*; *Reynolds v. Davis*, 198 Mass. 294, 84 N.E. 457; *A. R. Barnes & Co. v. Berry*, 156 Fed. 72.

⁵ *Gray v. Building Trades Council*, *supra*.

⁶ *National Protective Ass'n. v. Cumming*, *supra*; *State v. Stockford*, 77 Conn. 227, 58 Atl. 769; *Pickett v. Walsh*, *supra*.

⁷ *Purvis v. Brotherhood*, *supra*; *Schlang v. Ladies' Waist Makers' Union*, 124 N.Y. Supp. 289; *Booth v. Burgess*, 72 N.J. Eq. 181, 65 Atl. 226.

or by organization, will be enjoined from interfering with contracts of employment.¹ It has been pointed out that the definitions of the boycott vary,² but according to what appears to be the more commonly accepted use of the word, it involves acts of injurious combination, not justifiable as trade competition, and subject to injunction.³ Where the boycott constitutes an interference with interstate commerce, it may be enjoined on account of such fact;⁴ so also if it amounts to a violation of the federal antitrust law,⁵ or obstructs the mails.⁶

The subject of picketing requires but brief notice here.⁷ The matter of issuing injunctions to restrain this form of activity will be controlled by the views entertained by the court as to its lawfulness generally and the conditions affecting the particular case. Where it is regarded as an unlawful interference with business or employment, it will be enjoined, and has been itself called an attempt to enforce an unauthorized injunction by the organization engaging therein.⁸ In a few cases all picketing has been regarded as unlawful and subject to injunction;⁹ but the weight of opinion refuses to interfere with peaceful picketing,

¹ *United States v. Haggerty*, 116 Fed. 510; *Hitchman Coal Co. v. Mitchell*, 172 Fed. 963; *Connett v. Hatters*, *supra*.

² This section above; and see *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324.

³ See sec. 122; and see *Lohse Patent Door Co. v. Fuelle*, *supra*; *Shine v. Fox Bros. Mfg. Co.*, 156 Fed. 357, 86 C.C.A. 311; *Purvis v. Brotherhood*, *supra*.

⁴ *Toledo, etc., R. Co. v. Pennsylvania Co.*, *supra*; *In re Debs*, *supra*.

⁵ *Loewe v. Lawlor*, 208 U.S. 274, 28 Sup. Ct. 301; *United States v. Workingmen's Amal. Council*, 54 Fed. 994.

⁶ *In re Debs*, *supra*.

⁷ See sec. 121.

⁸ *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 698; and see *Sherry v. Perkins*, *supra*; *Union P. R. Co. v. Ruef*, *supra*.

⁹ *Atchison, etc., R. Co. v. Gee*, 139 Fed. 582; *A. R. Barnes & Co. v. Typographical Union*, 232 Ill. 424, 83 N.E. 940.

which does not intimidate from force of numbers or other cause, and is merely to gain information or to effect peaceful persuasion.¹ It was said in a recent case, however, that picketing, "in its mildest form, is a nuisance; and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted, antagonistic committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property as is a boycott which prevents the sale of his product."² In this case a boycott had been previously declared unlawful, and an injunction had been granted against threats, intimidation, or coercion with a view to preventing workmen from accepting employment with the plaintiff company. In the present instance an injunction was allowed restraining the defendant association and its officers from persuading or inducing persons or corporations not to deal with the company because it employed nonunion workmen. This is farther than injunctions usually go, but the court regarded the union as acting with no motive for interfering with the complainant beyond the avowed purpose of destroying it. "The result which they seek to obtain cannot come directly from anything they do within the regular line of their business as workers competing in the labor market. It can only come from action outside of the province of workingmen, intended directly to injure another."³

¹ *Karges Furniture Co. v. Woodworkers' Union*, *supra*; *St. Louis v. Gloner*, 210 Mo. 502, 109 S.W. 30; *Cumberland Glass Co. v. Glass Bottle Blowers*, *supra*; *Pope Motor Car Co. v. Keegan*, *supra*; *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 91 C.C.A. 631.

² *George Jonas Glass Co. v. Glass Bottle Blowers*, 72 N.J. Eq. 653, 66 Atl. 953; affirmed, 77 N.J. Eq. 219, 79 Atl. 262.

³ *Berry v. Donovan*, 188 Mass. 353, 74 N.E. 603; and see *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C.C.A. 99; *Shine v. Fox Bros.*, *supra*.

The fact that offensive boycotting or picketing followed a strike that was in itself legal in no wise affects the issue of an injunction restraining the offending acts.¹

SECTION 127. *Contempts.* — The willful violation or disregard of an injunctive order is a contempt of the court issuing it, and is liable to punishment as such. The power to enforce the penalty is inherent in all courts, and is essential to the enforcement of their orders and the due administration of justice.² Without it they would be "mere boards of arbitration whose judgments and decrees would be only advisory."³ The right to punish contempts belongs exclusively to the court against which the offense was committed, since in order to the securing of obedience to its orders, a court must have the right to inquire whether they have been disobeyed, and to submit this question to another tribunal would deprive the proceeding of half its efficiency.⁴ This view extends to the trial of contempts by jury, the alleged right to such trial being denied.⁵ Judgments of contempt may be taken for review to a superior court,⁶ such proceeding, in the absence of special statutes, being governed by the statutes generally applicable to the review of judgments.

Contempts are classed as direct, or those committed in the

¹ *Sailors' Union v. Hammond Lumber Co.*, 156 Fed. 450, 85 C.C.A. 16; *M. Steinert & Sons v. Tagen*, 207 Mass. 394, 93 N.E. 584.

² *Ex parte Robinson*, 19 Wall. (86 U.S.) 505; *Bessette v. Conkey*, 194 U.S. 324, 24 Sup. Ct. 665.

³ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492.

⁴ *In re Debs*, 158 U.S. 564, 15 Sup. Ct. 900.

⁵ *In re Debs*, *supra*; *Eilenbecker v. Plymouth Co.*, 134 U.S. 31, 10 Sup. Ct. 424; *O'Brien v. People*, 216 Ill. 354, 75 N.E. 108; *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803.

⁶ *Gompers v. Bucks Stove & Range Co.*, 37 Wash. L. R. 706, 33 App. D. C. 516; Same case, 221 U.S. 418, 31 Sup. Ct. 492; *ex parte Terry*, 128 U.S. 289, 9 Sup. Ct. 77.

presence of the court; and constructive or indirect, by which are meant acts of disobedience or disregard of its orders or writs elsewhere than its immediate presence. Obviously contempts in labor disputes will be mainly of the latter class. Various attempts have been made at legislative restriction of the power of the courts to punish for contempts, and some laws of this intent have been enacted. These laws may provide for jury trial in cases of indirect contempt,¹ or limit the penalty that may be inflicted by the court.² All the statutes cited were declared unconstitutional by the courts of the respective states as being unwarranted interferences by the legislative branch of the government with the inherent rights and powers of a coördinate branch;³ and it has been broadly laid down that the power to protect itself from contempt, and also to determine what is a contempt, is inherent in every court of superior jurisdiction, and that it is not within the power of the legislature to prevent the one or abridge the other.⁴ It was said in a case involving a statute of the state of Georgia, that a provision of the constitution to the effect that the power of the courts to punish for contempts shall be limited by legislative acts does not confer authority on the legislature to define contempts and restrict the jurisdiction of a superior court, created by the constitution, to those acts only which are specified. Thus a statute

¹ Okla., Acts 1895, ch. 13; Va., Acts 1897-8, p. 548.

² Mo., R.S., sec. 3882; Okla., Acts 1895, ch. 13.

³ *State v. Shepherd*, 177 Mo. 234, 76 S.W. 88; *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511; *Carter's Case*, 96 Va. 805, 32 S.E. 780; *Chicago, etc., R. Co. v. Gildersleeve*, 219 Mo. 170, 118 S.W. 86; *Burdett v. Commonwealth*, 103 Va. 838, 48 S.E. 878.

⁴ *Cheadle v. State*, 110 Ind. 301, 11 N.E. 426; and see *O'Brien v. People*, *supra*; *Ford v. State*, 69 Ark. 550, 64 S.W. 879; *Anderson v. Drop Forging Co.*, 34 Ind. App. 100, 72 N.E. 277.

providing that the power of a court to punish for contempt shall not extend to any cases except misbehavior in or so near the court as to obstruct justice, or misbehavior of an officer of the court in official transactions, or disobedience of a lawful writ, order, or process of the court¹ is not binding on a constitutional court, and it may, in order to preserve its constitutional powers, treat as contempts acts which clearly invade them, since the power to punish contempts is inherent in every court of record.² A statute of Kentucky, however, limiting penalties unless a jury trial is granted,³ was referred to in a case before the supreme court of that state as controlling in a possible case;⁴ and statutes regulating procedure are doubtless valid.⁵

The violation of an injunction may be passive as well as active, as where the officers of a labor organization fail to use reasonable efforts to secure from members of their unions obedience to the injunctive order, if such failure is apparently colored by bad faith.⁶ Nor is an injunction a necessary condition precedent to the commission of acts of contempt, since in cases of receiverships the mere fact that the property is in the hands of the courts makes interference with the receivers in the performance of their duties as officers of the courts contempt of court.⁷ Where em-

¹ Ga., Civ. Code, sec. 4046.

² *Bradley v. State*, 111 Ga. 168, 36 S.E. 630; see also *Hale v. State*, 55 Ohio St. 210, 45 N.E. 199; *ex parte McCown*, 139 N.C. 95, 51 S.E. 957.

³ Ky. Stat., sec. 1291. ⁴ *Underhill v. Murphy*, 117 Ky. 640, 78 S.W. 482.

⁵ N.Y., C.L., ch. 30, secs. 750-781; see *People v. Dwyer*, 90 N.Y. 402; *People v. Court*, 101 N.Y. 245; Wis., A.S., secs. 3477-3497; see *Emerson v. Huss*, 127 Wis. 215, 106 N.W. 518; *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N.W. 1095.

⁶ *In re McCormick*, 117 N.Y. Supp. 70; and see *Allis-Chalmers Co. v. Iron Molders' Union*, 150 Fed. 155.

⁷ *Davis v. Gray*, 16 Wall. (83 U.S.) 203; *Thomas v. Cincinnati, etc., R. Co.*, *supra*; *In re Doolittle*, 23 Fed. 544.

ployees of a company that is in the hands of a receiver appointed by a court are dissatisfied with the wages paid by him, they may abandon the employment, and by argument or persuasion induce others to do the same;¹ but if they resort to threats or violence to induce the others to leave, or accomplish their purpose without violence by overawing the others by preconcerted demonstrations of force, and thus prevent the receiver from carrying on the business, they are guilty of contempt.² And it has been held that strikers who were employees of a railroad not in the hands of a receiver are guilty of a contempt, even though intending none, if by unlawfully obstructing the operation of the road of their employer, not by merely quitting work, which is lawful, but by preventing the owners of the road from managing their own engines and running their own cars, they thus interfere with the operation of the road which is in the receivers' hands.³

It will be found in the great majority of cases, however, that contempt is held to consist in the known violation of specific orders, issued by the courts at the instance of an aggrieved party, and that proof of the specific act will be necessary to determine guilt; though incitement to violations, if manifestly of that intent, as by speaking slightly or defiantly of the court and its order, will also be regarded as contempt.⁴ What is a contempt will, therefore, be a matter of fact to be determined by the circumstances in each case. An act lawful in itself may by its

¹ *United States v. Kane*, 23 Fed. 748; *In re Doolittle*, *supra*; *Arthur v. Oakes*, 63 Fed. 310, 11 C.C.A. 1209.

² *United States v. Kane*, *supra*; *In re Higgins*, 27 Fed. 443; *United States v. Weber*, 114 Fed. 950.

³ *In re Doolittle*, *supra*.

⁴ *Gompers v. Bucks Stove & Range Co.*, 37 Wash. L. R. 706, 33 App. D.C. 516; *United States v. Haggerty*, 116 Fed. 510.

relations become wrongful; as where one labor organization is forbidden to interfere with the members of another in their employment, and its officers levy fines against their own members to compel them to cease work in such a manner as to lead to the discharge of the members of the complaining union. "The fact that such fine imposed upon its own members might be entirely lawful and just, when so imposed for a lawful purpose, cannot justify its infliction for a wrongful purpose in violation of a restraining order of a court."¹ The use of the highways, while in itself lawful, may be so practiced as to interfere unjustifiably with the tantamount right of others whose freedom the injunction was designed to protect, and so become a contempt.²

While the courts are not entirely agreed on the point, it is said by the Supreme Court that, where a boycott has been enjoined, "the strong current of authority is that the publication and use of letters, circulars, and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction."³ It was said that the question involved was not one of freedom of speech, but the power of a court of equity to enjoin the continuance of "a boycott which, by words and signals, printed or spoken, caused or threatened irreparable damage." Where a boycott has been enjoined and the attention of the public is subsequently directed to the fact that the plaintiff is still regarded as unfair by the organization against which the injunction ran, it is clear that contempt has been

¹ *Chicago Federation of Musicians v. Musicians' Union*, 139 Ill. App. 65.

² *Mackall v. Ratehford*, 82 Fed. 41; *Ideal Mfg. Co. v. Ludwig*, 149 Mich. 133, 112 N.W. 723.

³ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492.

committed;¹ and the use of the device of publishing a list of dealers or persons in good standing with the organization, coupled with a statement that only material from fair firms would be worked by union labor, will not avoid conviction for contempt, even though the union professes readiness to explain to dealers that, owing to the existence of the injunction, material from the plaintiff's shop will be worked despite the omission of his name from the approved list.² One refusing to carry out a court's order to a railroad to supply equal facilities to all for the interchange of interstate commerce is guilty of contempt, though he might have left service with impunity.³

From what was said in the foregoing section as to the binding effect of injunctions on persons not parties to the original bill, it follows that such persons are liable for contempt committed in violation of the injunctive order;⁴ and this is true even though the party might, on account of citizenship, have been precluded from the possibility of being made a party to the original bill.⁵ Otherwise no possible relief could be afforded a plaintiff by way of any other than the most inclusive "blanket injunction," and the courts would be powerless to maintain their effectiveness or dignity.

The punishment for contempt is by fine or imprisonment, or both, and is administered in the discretion of the court. Where damages are assessed, they will of course be adjusted to the

¹ *Gompers v. Bucks Stove & Range Co.*, 37 Wash. L. R. 706, 33 App. D.C. 516; *Patterson v. Building Trades Council*, 14 Pa. Dist. Rep. 843.

² *Huttig Sash & Door Co. v. Fuelle*, 143 Fed. 363.

³ *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. 746; *In re Lennon*, 166 U.S. 548, 17 Sup. Ct. 658.

⁴ *In re Lennon, supra*; *Conkey v. Russell*, 111 Fed. 417.

⁵ *Conkey v. Russell, supra*.

injury done. A corporation¹ or a voluntary association² may be adjudged guilty of contempt and fined, their nature forbidding imprisonment, though responsible members of an unincorporated union may be committed to prison until a fine assessed against it is paid, this liability being based on the partnership relation of the members of a voluntary association, in the view held by the court.³ Persons carrying out the mandates of an organization and thereby violating an injunction cannot offer the defense of agency, but are themselves guilty of contempt if they were aware of the existence of the order.⁴

Contempts are classed as civil or criminal as the proceedings contemplate chiefly the relief and benefit of the complainant who is injured by a noncompliance of the defendant with the injunctive order, or the punishment of the guilty person as a vindication of the authority of the court. The line between the two classes is not always easy to draw, since a single proceeding may partake of the characteristics of both.⁵ Punishment by imprisonment may be remedial as well as punitive, and civil contempt proceedings frequently result not only in the imposition of a fine payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is coercive, to secure the performance of the order of the court in behalf of the complainant, and release will follow compliance; whereas the penalty in a criminal procedure is

¹ *Chicago Typothetæ v. Franklin Union*, 36 Chi. Legal News 18; affirmed, *Franklin Union v. People*, 220 Ill. 355, 77 N.E. 176.

² *A. R. Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 402, 83 N.E. 932; *Patterson v. District Council*, 31 Pa. Sup. Ct. 112.

³ *Patterson v. District Council*, *supra*.

⁴ *In re Bessette*, 111 Fed. 417; *Gatzow v. Buening*, 106 Wis. 1, 81 N.W. 1003.

⁵ *Bessette v. Conkey*, *supra*; *O'Brien v. People*, *supra*; *Vilter Mfg. Co. v. Humphrey*, *supra*.

punishment for a completed act of disobedience, and imprisonment in such a case would be for a definite term.¹ The mixed nature of the proceedings is manifest from the fact that the performance of the court's order to compensate the complainant is a vindication of its authority; while the complainant is also indirectly benefited by the effect of a criminal punishment to prevent a repetition of the disobedience; though such indirect result cannot operate to convert a criminal contempt into a civil one.² An order of a court assessing a fine for contempt and directing that the fine be paid over to the original complainant was on appeal modified in respect of the disposition to be made of the fine, the court saying that there was no statute in the state authorizing the appropriation of a fine imposed for contempt of court to the party injured by the act constituting the contempt.³ The distinction between a refusal to do an act commanded for the benefit of the complainant, and the doing of an act forbidden, affords a basis for classifying contempts as civil or criminal. In the former case the original complainant is a party; in the latter, only the state. In the former the rules of evidence and procedure will be civil; in the latter, criminal, involving substantial differences in the rights and constitutional privileges of the defendants; and one improperly sentenced or held for the payment of damages to a complainant on account of the violation of an injunction may on appeal be absolved from that obligation and yet be guilty of contempt of court and liable to punishment criminally.⁴

¹ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492.

² *Gompers v. Bucks Stove & Range Co.*, *supra*.

³ *A. R. Barnes & Co. v. Chicago Typographical Union*, *supra*.

⁴ *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 Sup. Ct. 492; *Wornden v. Searls*, 121 U.S. 14.

An injunction against interference with the mails or interstate commerce, or with private business, may be violated by the commission of criminal acts. These are of course punishable as contempts, since they are acts of disobedience to the orders of the court, but are none the less indictable as crimes, whether the contempt was civil or criminal.¹ "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."²

SECTION 128. *Mediation and Arbitration.* — In the matter of the adjustment of labor disputes, it is obvious that, as in any other class of disputes, the parties may agree to terms of settlement suggested by friendly intervenors, or may agree to refer the question in dispute to a person or committee chosen for the purpose. No question of enforcement or of legal construction could well arise under such circumstances, since adjustments of this sort take form and effect entirely from the mutual agreement of the parties in interest. As favoring the peaceful settlement of labor disputes in lieu of resort to strikes and lockouts, laws have been enacted in more than one-half of the states of the Union, and by Congress, providing for the formation of boards or tribunals for the adjustment of cases submitted to them. Submission may be made on the motion of the parties, or of either of them, as the law may provide; while in some instances intervention is authorized on the initiative of the board or of a local municipal officer. The duty of preliminary inquiry and of making efforts at mediation may devolve under the statute on the commissioner of labor of the state, either on his own initiative or by request.

¹ N.Y., C.L., ch. 30, sec. 776.

² *In re Debs, supra.*

The law may provide for a state board,¹ or for local boards,² or for both state and local boards.³ Where the latter provision exists, the local boards may be authorized to ask for advice and assistance from the state boards,⁴ or they may be independent and have full powers of action.⁵ The methods of constituting the boards vary, though it is usually provided that their membership shall represent both employers and employed. State boards are commonly appointed by the governors, while local or special boards may be selected by the court or judge having jurisdiction in the locality, or the members may be chosen one by the employer, one by the workmen, and a third by the first two. If the dispute is one involving the membership or interests of a labor organization, such organization may, according to the provisions of a number of statutes, have representation on the board.

Mediation is the attempt to procure an agreement between the parties by such mutual concessions as consideration and advice may result in. It is made the duty of nearly all the state boards to attempt mediation when information is received of actual or threatened difficulties. Arbitration involves a hearing of the parties and an award based on the apparent equities of the case. This will not be usually undertaken except on the request of the parties or of one of them, and is binding only as assented to by both parties in the application or consent for submission. Applicants are obligated to maintain unchanged the status of em-

¹ Cal., Acts 1891, ch. 51; Conn., G.S., secs. 4708-4713; Ill., R.S., ch. 10, secs. 19-26; Mass., Acts 1909, ch. 514, secs. 10-16; Minn., R.L., secs. 1828-1834; N.Y., C.L., ch. 31, secs. 140-148; Ohio, Gen. Code, secs. 1059-1079.

² Kans., G.S., secs. 332-341; Md., Pub. G. L., Art. 7, secs. 1-6, Acts 1904, ch. 313; Pa., B.P. Dig., p. 132, secs. 58, 67-70.

³ Cal., Mass., Minn., N.Y., etc.

⁴ Mass., Ohio.

⁵ Minn., N.Y.

ployment conditions until the determination of the board can be reached. Provision is made in most instances for the attendance of witnesses to be enforced by subpoenas, and one or all the members of the boards are authorized to administer oaths in respect of the matters connected with the performance of their duties. It is provided in some statutes that persons disobeying the subpoenas or refusing to answer the questions propounded by the board shall be certified to a court of the county or district and punished for contempt. In this connection may be noted a decision of the supreme court of Missouri¹ declaring this provision of the statute of that state unconstitutional and void, since the court has no power to exercise such a prerogative except in administering justice in cases before it in its own jurisdiction, and cannot so act in behalf of any other body or tribunal, even another court. The court did not dispute, however, the power of the legislature to make a refusal to testify a misdemeanor, punishable by fine and imprisonment by a court of competent jurisdiction.²

The methods proposed for enforcing obedience to awards by the boards are various. Some statutes depend upon publicity alone, though in others they undertake to give the decisions the effect of a judgment of a court of law, to be enforced by execution; while in others, disobedience is made punishable as for contempt of court. It is to be borne in mind that these provisions apply only when there has been an agreement to submit the question and to abide by the awards of the boards, there being no statute that provides for actual compulsory arbitra-

¹ *State v. Ryan*, 182 Mo. 349, 81 S.W. 435.

² See *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 15 Sup. Ct. 19, as to the power of a commission to call on a court to use its powers to secure the giving of testimony.

tion and the acceptance of awards. But even so, the power of a court to take over and enforce the findings of such a tribunal, whether this enforcement is to be by means of contempt proceedings or otherwise, is of at least doubtful feasibility under the controlling provisions of the constitutions of the various states and of the United States.

An instance of an attempt to combine functions appears in a statute of Kansas,¹ which undertook to establish a "court of visitation," with jurisdiction over the operations of railroads. This court was to have power to make and enforce orders to the extent of appointing a receiver for any road not complying therewith. It was also authorized to issue orders and compel obedience thereto in cases of disputes affecting railroad employees. This law was declared unconstitutional by both state and federal courts as being an attempt to confer on a single body legislative, administrative, and judicial powers, contrary to the provisions of the constitution.²

The costs of hearing before these boards are usually to be met by the state, though in some states the parties having recourse to the boards, or in whose behalf they are formed, are charged with the costs, their apportionment being a part of the award which it is the duty of the board to make.

From the nature of the tribunals and the objects for which they are created, it is natural that there should have been but little judicial consideration given to the laws establishing them or to the operations of the boards themselves. The statute of Michigan³

¹ Acts 1898-9, ch. 28.

² *State v. Johnston*, 61 Kans. 803, 60 Pac. 1068; *Western Union Tel. Co. v. Myatt*, 90 Fed. 335.

³ C.L., secs. 559-568, as amended by act No. 69, Acts 1903; repealed May 1, 1911.

provided for a state board appointed by the governor. Each arbitrator could administer oaths, and the secretary, not a member of the board, might, under the direction of the court, subpoena witnesses, administer oaths, and compel the production of books, papers, and documents, the same as courts of record. The constitution of the state provides that "the legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law." No provision was made for the enforcement of awards, and the submission of disputes was of course voluntary. In a case¹ in which the constitutionality of the statute was challenged, it was upheld by the supreme court of the state. As the case was presented it involved the validity of an order for a rehearing, one of the parties to an arbitration having secured such an order because of dissatisfaction with the award. The court held that the law gave the board no power beyond that of rendering and filing a decision, and that in granting a rehearing it had exceeded its authority. In another case² involving the same law, where there had been a submission under an agreement to abide by the decision reached in reference to prices, it was contended by one of the parties that an award substituting piece rates for wages by the day exceeded the authority of the board under the terms of submission. The supreme court held that if the board had in fact exceeded the terms of submission, the contention would be a valid one, but since the question was one of prices, and evidence as to both time and piece rates had been heard without objection, the court had not exceeded its powers. Another point in question was the construction to be put on a proviso to the

¹ *Renaud v. State Court of Mediation, etc.*, 124 Mich. 648, 83 N.W. 620.

² *Pingree v. State Court of Mediation, etc.*, 130 Mich. 229, 89 N.W. 943.

effect that decisions should be rendered within ten days after the hearing. The supreme court construed this as directory only, and not mandatory, and a delay of twelve days additional was held, in the circumstances, not to invalidate the award.

The statute of Louisiana ¹ was enacted under the authority granted to the legislature by the constitution "to pass such laws as may be proper and necessary to decide differences by arbitration." It provides for efforts at conciliation in cases of labor disputes on the application of the parties, or either of them, or of the mayor of a city or of the judge of a district court. No provision is made for the enforcement of any finding of the board, but if its efforts at mediation fail, its conclusions are to be recorded on its books and also at once made public. In a case ² in which a request for intervention had been made by an association claiming to represent the employees of a street railway company (which claim the company denied), the company refused to join in the request, and asked for an injunction to restrain the board from making any decision, on the ground that such action would cause trouble and dissension among its employees. Irregularities were asserted, and the need of intervention denied. The mayor of the city had sent a statement as to strained conditions and suggested an investigation. The supreme court of the state held that no restraint by injunction would be proper on a suggestion of the mere apprehension of injury, and that before it could act on questions of alleged irregularity they should be argued before the board and decided upon by it. The board was said to be one of conciliation, with no power but to form and record a decision, and without

¹ Acts 1894, No. 139.

² *Railroad Co. v. State Board of Arbitration*, 47 La. Ann. 874, 17 So. 418.

judicial function. It is not bound by technical rules of legal procedure, but must conform to the statute under which it exists, and should "observe the broad rules of law and equity without which a decision cannot be just."

The federal statute relative to mediation and arbitration,¹ popularly known as the Erdman Act, relates only to common carriers and their officers, agents, and employees engaged in interstate commerce, except masters of vessels and seamen. The act provides for a commission consisting of a member of the Interstate Commerce Commission or of the Court of Commerce, designated for this duty by the President,² and the United States Commissioner of Labor. This commission is to exercise its functions as a mediator on the request of either party to a controversy between the carrier and its employees, concerning wages, hours of labor, or conditions of employment. If mediation and conciliation fail to lead to an amicable settlement of the difficulty, the commission is to at once endeavor to bring about an arbitration of the controversy. The board of arbitration is to consist of three members, one named by the company, one by the labor organization representing the employees affected, and the third by the first two; if the persons named by the parties fail to nominate the third member within five days from their first meeting, the commissioners for mediation may name him.

Submission to arbitration is by stipulations signed by both parties, who agree under liability for damages to maintain the

¹ U.S. Comp. Stat., p. 3205, 30 Stat. 424.

² Prior to the act of March 4, 1911 (36 Stat. 1397), making this provision as to designation by the President, the chairman of the Interstate Commerce Commission was fixed upon by the law as a member of the commission of mediation.

existing status pending the decision of the board, by which they promise to abide. Equity may enforce the award so far as its powers extend. It has already been noted that equity cannot compel the performance of a labor contract against the will of any person. Dissatisfaction with the award is not to be a ground for withdrawal or discharge from employment within three months from its rendition unless the party wishing to terminate the relation gives the other party thirty days' notice in writing. Awards continue in effect for one year from the date of their going into operation. The award is to be filed in the clerk's office of a circuit court of the United States within thirty days from the appointment of the third arbitrator, and is to go into effect and judgment be entered upon it within ten days from the date of its filing unless exceptions for matter of law are filed, in which case the operation of the award is suspended until determination is made by the court as to the exceptions. This decision is to become the basis of a judgment at the expiration of ten days unless within that time an appeal is taken to a circuit court of appeals.

There is little from which to determine the judicial construction of this act. A case involving the determination by arbitrators of four points in issue between a railroad company and an order of telegraph operators¹ resulted in objections by the telegraphers to the award in two points, and a request for an entry of judgment as to the remaining two points. The first item submitted was as to whether the members of the telegraphers' order employed by the company should "legislate for" or act in behalf of its train dispatchers in the matter of wages and in arbitration proceedings. On this point the ar-

¹ *In re Southern Pacific Co.*, 155 Fed. 1001.

bitrators decided in the negative, though the train dispatchers were for the most part members of the order and had voted to authorize the operators to so act in their behalf. The arbitrators rejected the contention of the organization that only the question of agency was submitted, since no mere matter of simply determined fact would have been referred for decision, but that the fair understanding of the submission was as to the question of principle or policy affecting the relations of the parties and the methods of conducting the dealings of the employer with its dispatchers; and on a showing by the company that the duties of dispatchers were essentially different from those of operators, and that the two bodies of employees were generally classed as distinct, the award of the arbitrators was affirmed. The second contention was that a specific portion of the award was not responsive to the terms of the submission. This the court found to be well founded, and the plea of the company to be allowed to offer an interpretation of the clause of the submission under consideration was refused, the court holding that where there was no ambiguity there was no room for interpretation. It was said that the act providing for arbitration put the proceedings on no different footing from that of common-law arbitrations, *i.e.*, that they rest entirely on the agreements made by the parties, from which alone the arbitrators derive their authority. "While the proceeding is judicial in its character, the relation of the parties is purely a contractual one; and in no respect, other perhaps than in the application of the rules of evidence, does the proceeding partake of the nature of a civil action." The rules that govern are therefore those that relate to the construction and interpretation of contracts rather than to pleadings in a suit at law; so that if any award is not

responsive to the terms of submission as they would be ordinarily understood, it is not binding upon the parties.

As to the request for entry of judgment on the uncontroverted portions of the award, the court ruled that, under the provisions of the act governing exceptions and appeals, no judgment could be entered prior to ten days after the determination of the exceptions; and that moreover the general rules applicable in proceedings of this sort did not provide for the enforcement of awards by piecemeal, since each item would doubtless be decided in contemplation of all the others, so that while formally separable, the award must as a matter of fact be regarded as a unit, and indivisible for purposes of enforcement.

APPENDIX

Following is the Field Code (see sec. 4), here reproduced as presenting in a concise form the general rules of the common law governing the employment of labor. The numbering of the sections is that used in the Civil Code of Montana, 1895.

SECTION 2650. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or of a third person.

SEC. 2660. An employer must indemnify his employee, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful.

SEC. 2661. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed.

SEC. 2662. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

SEC. 2670. One who, without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

SEC. 2671. One who, by his own special request, induces another to intrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

SEC. 2672. A gratuitous employee, who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so.

SEC. 2673. One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed.

SEC. 2674. One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter.

SEC. 2675. A contract to render personal service, other than a contract of apprenticeship, * * * cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

SEC. 2676. An employee must substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee.

SEC. 2677. An employee must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

SEC. 2678. An employee is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

SEC. 2679. An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.

SEC. 2680. Everything which an employee acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

SEC. 2681. An employee must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

SEC. 2682. An employee who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is

not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employee himself.

SEC. 2683. An employee who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference.

SEC. 2684. An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

SEC. 2685. An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

SEC. 2686. Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

SEC. 2700. Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

1. The death of the employer; or,
2. His legal incapacity to contract.

SEC. 2701. Every employment is terminated:

1. By the expiration of its appointed term.
2. By the extinction of its subject.
3. By the death of the employee; or,
4. By his legal incapacity to act as such.

SEC. 2702. An employee, unless the term of his service has expired, or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

SEC. 2703. An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this title.

SEC. 2704. An employment, even for a specified term may be terminated at any time by the employer, in case of any willful breach of duty by the employee in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

SEC. 2705. An employment, even for a specified term, may be terminated by the employee at any time, in case of any willful or permanent breach of the obligations of his employer to him as an employee.

SEC. 2706. An employee, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

SEC. 2707. An employee who quits the service of his employer for good cause is entitled to such proportion of the compensation which would become due in case of full performance as the services which he has already rendered bear to the services which he was to render as full performance.

SEC. 2720. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

SEC. 2721. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year ; a hiring at a daily rate, for one day ; a hiring by piecework, for no specified term.

SEC. 2722. In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

SEC. 2723. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

SEC. 2724. The entire time of a domestic servant belongs to the master ; and the time of other servants to such extent as is usual in the business in which they serve, . . .

SEC. 2725. A servant must deliver to his master, as soon as with reasonable diligence he can find him, everything that he

receives for his account, without demand ; but he is not bound, without orders from his master, to send anything to him through another person.

SEC. 2726. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not :

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same ; or,

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that if the master had known or contemplated it, he would not have so employed him.

SEC. 2760. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession for the purpose of rendering service about it, must complete such service, and use ordinary care, diligence, and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses, incurred by him about such service, from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

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